

1 STATE OF MINNESOTA DISTRICT COURT
2 COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT
3 - - - - -
4 The State of Minnesota,
5 by Hubert H. Humphrey, III,
6 its attorney general,
7 and
8 Blue Cross and Blue Shield
9 of Minnesota,
10 Plaintiffs,
11 vs. File No. C1-94-8565
12 Philip Morris Incorporated, R.J.
13 Reynolds Tobacco Company, Brown
14 & Williamson Tobacco Corporation,
15 B.A.T. Industries P.L.C., Lorillard
16 Tobacco Company, The American
17 Tobacco Company, Liggett Group, Inc.,
18 The Council for Tobacco Research-U.S.A.,
19 Inc., and The Tobacco Institute, Inc.,
20 Defendants.
21 - - - - -

22 TRANSCRIPT OF PROCEEDINGS
23 VOLUME 62, PAGES 12065 - 12339
24 APRIL 15, 1998
25

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CROSS-EXAMINATION - B. SCOTT APPLETON

1 P R O C E E D I N G S.
2 THE CLERK: Please rise. Ramsey County
3 District Court is again in session, the Honorable
4 Kenneth Fitzpatrick now presiding.
5 (Jury enters the courtroom.)
6 THE CLERK: You may be seated.
7 THE COURT: Good morning.
8 (Collective "Good morning.")
9 THE COURT: Counsel.
10 MR. CIRESI: Thank you, Your Honor.
11 Good morning, ladies and gentlemen.
12 (Collective "Good morning.")
13 B. SCOTT APPLETON
14 called as a witness, being previously
15 sworn, was examined and testified as
16 follows:

17 CROSS-EXAMINATION (cont'd)
18 BY MR. CIRESI:
19 Q. Good morning, doctor. How are you today?
20 A. Good morning.
21 Q. Sir, can you pull out volume one, and can you
22 direct your attention to the exhibit that we were
23 discussing yesterday when we recessed, Exhibit 11180.
24 A. 11180. Oh, I see.
25 Q. Do you have it, sir?

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1 A. Yes.
2 Q. Okay. You'll recall that was the letter dated
3 January 10th, 1985 from the deputy chairman of BATCo

4 to Mr. Hardwick.
5 A. Yes.
6 Q. Now Mr. Pritchard, the deputy chairman of BATCo
7 in 1985, subsequently became the CEO of Brown &
8 Williamson; correct?
9 A. Yes.
10 Q. Do you know when he became the CEO of Brown &
11 Williamson?
12 A. No, I don't know the date.
13 Q. Was it shortly after January of 1985?
14 A. I -- I don't know.
15 Q. Can you direct your attention, please, sir, to
16 Exhibit 13851. It's toward the end of the same
17 volume.
18 A. I got it.
19 Q. Now this is a memorandum for file dated January
20 17th, 1985, about seven days after the Pritchard to
21 Hardwick letter, and it's from J. Kendrick Wells. Do
22 you see that?
23 A. Yes.
24 Q. And the title of it is "Document Retention."
25 It's difficult to make out, sir, but --

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1 A. Yes.
2 Q. -- this is the best copy that we've been able to
3 receive.
4 A. I see that.
5 Q. Can you see that?
6 A. Yes, I see that.
7 Q. Okay. And let me just read the first two
8 paragraphs here. "On Tuesday, January 15th, I talked
9 with Earl Kohnhorst about engineering and scientific
10 reports held by the RD -- R&D Department." Do you
11 see that?
12 A. Yes.
13 Q. The second paragraph then states, "I gave Earl
14 copies of pages which contained various document
15 numbers and files, and document numbers and
16 abstracts. I explained I had marked certain of the
17 document references with an X. The X designates
18 documents which I suggested were deadwood in the
19 behavioral and biological sciences area. I said that
20 the 'B' series are 'Janus' series studies and should
21 also be considered as deadwood." Do you see that?
22 A. Yes, I do.
23 Q. Now the JANUS "B" series, they were not
24 published; were they?
25 A. "Published," you mean in the public literature?

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1 Q. Yes.
2 A. No.
3 Q. So they were what I believe you referred to as
4 proprietary information; correct?
5 A. I don't recall me saying that. I -- I think we
6 already had this discussion earlier.
7 Q. Now by "deadwood," do you know what was meant by
8 Mr. Wells?

9 A. No.
10 Q. Okay. Can you go on to the next page, and I'd
11 like to direct your attention to the second
12 paragraph.
13 A. Yes, I see it.
14 Q. "I suggested that Earl have the documents
15 indicated on my list pulled, put into boxes and
16 stored in the large basement storage area."
17 Now "pulled" would be pulled from the library;
18 correct?
19 A. I assume that's what -- that's what that means.
20 Q. "I said that we would consider shipping the
21 documents to BAT when we had completed segregating
22 them. I suggested that Earl tell his people" --
23 Now Earl was in the R&D department; correct?
24 A. I know he was at some point, but I don't know
25 the exact dates of his tenure there.

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12070

1 Q. Well this implies that Earl was in charge of
2 something, because he's talking about Earl telling
3 his people; correct?
4 A. He --
5 Yeah, he may have been. He may have been head
6 of R&D at that time.
7 Q. Fair assumption; is it not, sir?
8 A. Yes.
9 Q. "I suggested that Earl tell his people that this
10 was part of an effort to remove deadwood from the
11 files and that he -- and that neither he nor anyone
12 else in the department should make any notes, memos
13 or lists." Do you see that?
14 A. Yes.
15 Q. Now if one wanted to take documents from a file
16 and not leave a paper trail, one way to accomplish
17 that would be by not making any notes, memos or
18 lists; correct?
19 A. That would --
20 That could be a way to do it, yes.
21 Q. It would make it much more difficult for one who
22 was attempting to reconstruct and see whether all
23 documents have been gathered to ascertain whether all
24 documents had in fact been retained; isn't that
25 correct?

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12071

1 A. I -- I think that's a safe assumption.
2 Q. Now at this point in time, Mr. Wells was a
3 lawyer in the department at Brown & Williamson;
4 correct?
5 A. I believe so, yes.
6 Q. And again, as I said earlier, this was about
7 seven days after Mr. Pritchard told Mr. Hardwick to
8 ship documents to Brown & Williamson via a law office
9 in Louisville; correct?
10 A. I'm sorry, Mr. Hardwick asked Mr. Pritchard to
11 do what?
12 Q. Mr. Pritchard told Mr. Hardwick to ship
13 documents to Brown & Williamson via a law firm in

14 Louisville.
15 A. I don't recall that particular -- that
16 particular sequence of events. That may have been
17 it, but my recollection is --
18 Q. Maybe we could look at the document again.
19 A. Okay. What number was that?
20 Q. It's on the screen right now.
21 A. Okay.
22 Q. Can you read that? Otherwise I'll --
23 A. Well if you can magnify it I can read it, but
24 this is real fuzzy compared to the last --
25 Q. All right. Why don't you go to Exhibit 11180.
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12072

1 A. Well I can read it. It's looks magnified enough
2 right now.
3 Q. Okay. "Dear Mike."
4 Mike is Mr. Hardwick; correct?
5 A. Yes.
6 Q. "Would you please arrange for all reports and
7 materials for worldwide distribution emanating from
8 GR&DC to be -- to be sent to Robert Maddox, Jr.,
9 Wyatt, Tarrant & Combs, 26th Floor - Citizens Plaza,
10 Louisville, Kentucky, U.S.A." Now that's a law firm
11 in Louisville; correct?
12 A. Yes.
13 Q. That's where Brown & Williamson is located;
14 correct?
15 A. Yes.
16 Q. Correct?
17 A. Yes.
18 Q. "This firm" -- that means the law firm --
19 "should not be listed as a distributee in the
20 documents nor should B&W." Correct?
21 A. Yes.
22 Q. "Any mail sent to Maddox should be accompanied
23 by a simple cover letter indicating that BAT Millbank
24 has asked that he should receive it." Correct?
25 A. Yes.

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12073

1 Q. All right. So seven days before Wells is
2 talking about deadwood and collecting things out of
3 his files, Mr. Pritchard, who was to become the CEO
4 of Brown & Williamson, is saying that for documents
5 regarding research that's going to be sent to Brown &
6 Williamson, that they should be sent to the law firm
7 without any tape of paper trail; isn't that right?
8 A. That's what the document suggests, yes.
9 Q. And Mr. Pritchard also in this letter, in his
10 second prong, says that items that are normally
11 forwarded to this office, meaning his office, for
12 clearance first should continue to be sent here;
13 correct? Last sentence, sir.
14 A. Yes.
15 Q. So that at that time, as indicated by this
16 letter, Mr. Pritchard was receiving information from
17 the research department and clearing it before
18 forwarding on to B&W; correct?

19 A. Well it says he was receiving items. I'm not
20 sure if it says what items he was receiving.
21 Q. Well we know he was receiving items for
22 clearance; right?
23 A. Right. But I don't know if it says that they're
24 research reports.
25 Q. Well it would be fair to state it wasn't for how
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12074

1 many staplers or papers should be purchased by B&W,
2 mundane things.
3 A. I assume the CEO gets lots of things for his
4 clearance over his desk.
5 Q. Well he certainly doesn't clear paperclips and
6 things like that; does he?
7 A. I doubt it.
8 Q. Yeah. It would be more likely that he would be
9 clearing sensitive information; isn't that right?
10 A. I would think it would be all kinds of business
11 information, things that require his signature,
12 capital expenditures, things of that nature, may be
13 reports. But I don't see where it says that in this
14 document.
15 Q. Well certainly the law firm in Louisville,
16 Kentucky, doesn't approve budgets for B&W, or capital
17 expenditures; correct?
18 A. I don't believe so.
19 Q. You've never heard of anything like that; have
20 you, sir?
21 A. No. I'm -- maybe I'm misreading this. It
22 appears to me that Mr. Pritchard is saying that he
23 received some items for clearance, but I don't know
24 what those items are. I don't know if this memo
25 indicates what those items are.

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12075

1 Q. But in the context of the memo, doctor, is it
2 not fair to assume that it's information from the
3 research and development group?
4 A. It may be. I just don't know if I can make that
5 assumption. I've never seen this document.
6 Q. So from the context of the document, you can't
7 make that assumption; is that what you're saying?
8 A. Not necessarily.
9 Q. Now in 1985, shortly after the deadwood memo of
10 Mr. Wells, B.A.T ceased doing in-house biological
11 research; isn't that correct?
12 A. No, that's not correct.
13 Q. Can you direct your attention to Exhibit 11946.
14 A. In volume number two?
15 Q. It's still in volume number one.
16 A. I'm sorry.
17 Okay.
18 Q. Now this is a "TOBACCO RESEARCH IN BAT
19 INDUSTRIES;" correct?
20 A. Yes, that's what the document says.
21 Q. And it's dated April 3rd, 1985?
22 A. Yes.
23 Q. Correct?

24 Okay. That's shortly after the deadwood memo
25 that we saw which was January 17th, 1985?
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12076

1 A. Yes.
2 Q. And the title again is "TOBACCO RESEARCH IN BAT
3 INDUSTRIES." Correct?
4 A. Yes.
5 Q. And in the first paragraph we see that "BATCo
6 has been charged by BAT Industries to define and to
7 progress towards R&D objectives which will give BAT a
8 competitive lead in the market place?" Do you see
9 that?
10 A. Yes.
11 Q. And if you go down to paragraph numbered one, do
12 you see that? First page, says number one.
13 A. Yes.
14 Q. Okay. Right above that, the paragraph states,
15 "In order to relate the Group research and
16 development programme more closely to the different
17 needs of BAT Group's tobacco companies, it will be
18 necessary:
19 "1. to redefine the basic strategy of R&D and
20 the design of research programmes undertaken by the
21 different CAC companies."
22 A. Yes.
23 Q. Now B&W would be one of the CAC -- CAC
24 companies.
25 A. Yes, it would be, yes.

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12077

1 Q. BATCo would be one of the CAC companies;
2 correct?
3 A. That's correct.
4 Q. Okay. "Research will have the broad objective
5 of innovation of understanding the smoker's
6 discernment of quality, and of recognition of the
7 smoker's concern." Do you see that?
8 A. Yes.
9 Q. Now if you go to page 607 of that document,
10 please -- and that's the last three Bates numbers,
11 607 -- and you see there under "RESEARCH, Biological
12 Research," that "All in-house animal work will cease
13 and future studies involving animals will be done
14 externally under contract?"
15 Do you have it sir? I'm sorry. Page 607 at the
16 top.
17 A. Right. The first -- first paragraph?
18 Q. Yes. And is it reported there that "All
19 in-house work will cease and future studies involving
20 animals will be done externally under contract?"
21 A. Yes.
22 Q. See that?
23 A. And it also goes on to say --
24 Q. Well --
25 A. Well first of all it acknowledges that future

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1 research in animal studies that will continue will be
 2 done in contract laboratories, but it also says that
 3 biological research will continue in the form of in
 4 vitro short-term tests such as the Ames test which
 5 will be continued to be conducted in-house.

6 Q. Right. And let -- let me go on. That was going
 7 to be the next sentence. But it says, "All in-house
 8 animal work will cease and future studies involving
 9 animals will be done externally under contract."

10 Correct?

11 A. Yes.

12 Q. Okay. "A Senior Research Scientist will be
 13 retained to co-ordinate external work and to provide
 14 expertise in toxicology. In vitro short term tests,
 15 such as the Ames test, will be retained" --
 16 correct?

17 A. Yes.

18 Q. -- "since these are used for product screening
 19 and could form the basis of a biological league
 20 table." Do you see that?

21 A. Yes.

22 Q. Now what's a biological league table?

23 A. Well a league table is a -- it's a listing of --
 24 In the sense that I typically think about it,
 25 it's a listing of deliveries of tars. Like the

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1 Federal Trade Commission in the United States
 2 requires that all U.S. cigarettes be tested for tar
 3 and nicotine deliveries and then publishes those, and
 4 that's referred as a league table; namely, a -- a
 5 listing of various attributes. And apparently there
 6 was some indication from regulatory authorities in
 7 Europe that in fact Ames activity may be included as
 8 a parameter or a measurement along with other things,
 9 like tar and nicotine, so I believe that that's what
 10 they're referring to.

11 Q. And so what they're saying here is that for
 12 biological purposes, Ames testing will be retained
 13 in-house; correct?

14 A. Well they --

15 They're saying it will be retained for screening
 16 purposes and the possibility that there may be a
 17 league table requirement to -- to conduct that work.

18 Q. And they were going to use the Ames test as a
 19 basis, that could form the basis of a biological
 20 league test; correct?

21 A. Well I'm not sure if that's -- they're saying
 22 that they're going to do that. I believe what they
 23 were thinking is -- is it is possible by indications
 24 from regulatory authorities that they may have that
 25 intention. I believe discussions were going on in

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1 Europe at the time, and the regulatory authorities
 2 were suggesting that may be something that they would
 3 want to do. In addition to tar and nicotine, they
 4 may want to include Ames activity. So it appears

5 that -- that R&D recognized that and was preparing
6 for that possibility.
7 Q. What was being proposed was a biological league
8 table. What was being proposed in this memorandum is
9 that the Ames test could be used as a basis for that
10 biological league table. Isn't that what it says,
11 sir?
12 A. They're saying that -- that the Ames test
13 could --
14 Q. Form the basis.
15 A. -- form the basis of a biological league table.
16 Q. All right.
17 A. That's what it says.
18 Q. So that what was being considered was that if
19 there is a biological league table, Ames testing
20 could be used as a method --
21 A. That that was --
22 Q. -- to form the basis --
23 A. Right. That was a possibility.
24 Q. -- for providing information.
25 A. That was definitely a possibility that was

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12081

1 discussed at the time.
2 Q. Okay. Let me give you just a word of caution
3 here because it's very difficult on the court
4 reporter if you and I overspeak each other.
5 A. Okay.
6 Q. And I'll try to wait until you're done, if you
7 do the same.
8 A. I appreciate that.
9 Q. Otherwise --
10 And Mr. Stirewalt will really appreciate it.
11 A. Okay.
12 Q. All right.
13 Now the Ames test was the test that you
14 discussed in your direct testimony, which was a test
15 that was designed and invented by Bruce Ames from the
16 University of California at Berkeley; correct?
17 A. Yes.
18 Q. And that is used by scientists in the field;
19 correct?
20 A. In what field?
21 Q. In the biological fields.
22 A. Yes. It is used by many people, scientists
23 particularly in toxicology.
24 Q. And it's used today; correct?
25 A. Oh, yes, definitely.

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12082

1 Q. Used widespread today; correct?
2 A. Yes.
3 Q. Now with regard to smoke research, what's being
4 proposed here is that "More resources" -- if you look
5 to the next paragraph and the last line, "More
6 resources will be provided for research into means of
7 enhancing nicotine transfer to smoke and experimental
8 combustion research, including cigarette paper
9 effects." Correct?

10 A. That's what the document says, yes.
11 Q. Okay. So that at this point in time, what was
12 being considered at BATCo in 1985 was to direct more
13 resources into the means of enhancing nicotine
14 transfer from tobacco to cigarette smoke.
15 A. Well this -- this falls into the area of -- of
16 sensory research and consumer acceptance. A major
17 issue with safe cigarette research was gaining
18 consumer acceptance, and this work, I believe, was
19 geared towards exploring ways that -- for gaining
20 consumer acceptance of safe cigarettes or what might
21 be regarded as safe cigarettes.
22 Q. What it says, sir, is enhancing nicotine
23 transfer to smoke.
24 A. Yes.
25 Q. Is that what it says?

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12083

1 A. That was thought to be a possible strategy to do
2 that.
3 Q. Now can you direct your attention to Exhibit
4 26208, which is in the second volume.
5 A. I'm sorry, what was the tab again?
6 Q. 26208.
7 A. Got it.
8 Q. All right. Now that's a memo from J. Kendrick
9 Wells III; correct?
10 A. Yes.
11 Q. And it's to John David Myles; correct?
12 A. Yes.
13 Q. Dated August 1, 1985; correct?
14 A. Yes.

15 MR. CIRESI: Your Honor, we'd offer Exhibit
16 26208.

17 MR. BERNICK: Same objections as previously
18 lodged in the record, Your Honor.

19 THE COURT: Court will receive 26208.
20 BY MR. CIRESI:

21 Q. Now this also bears the legend on the left-hand
22 side privileged and confidential, produced as
23 required by the court's March 7th, 1968 order.
24 A. Yes.
25 Q. 1998 order, excuse me.

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12084

1 A. Yes.
2 Q. Correct?
3 A. Right, I see that.
4 Q. Did you ascertain last evening whether or not
5 there were a number of documents produced last week?
6 A. No.
7 Q. You didn't.
8 A. No.
9 Q. Have you reviewed this document?
10 A. I have seen this.
11 Q. Okay. When did you review it?
12 A. Within the last couple of days. I'm not sure if
13 it was yesterday or the day before.
14 Q. Okay. That was the first time you saw it, sir?

15 A. Yes. I believe this is among the ones that you
16 designated for my cross-examination. That's when I
17 had the first opportunity to see it.
18 Q. Now this is roughly six, seven months after Mr.
19 Wells' memo back in January of this year -- of that
20 year, 1985; correct?
21 A. Yes.
22 Q. And it's a few months after his deadwood file;
23 correct?
24 A. Yes.
25 Q. And here he's saying he has "placed in he
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12085

1 E-tonda's cabinet" --
2 Do you know what that refers to?
3 A. No. Sounds like a person's name, but I don't
4 know who it is.
5 Q. -- "a group of R&D reports produced by various
6 companies in the BAT organization. Please send these
7 to Anne Johnson with a cover letter which should say
8 simply that I asked you to send the enclosed
9 documents to her for review. The cover letter should
10 not identify the documents and I would appreciate it
11 if you would say also in the cover letter that I am
12 out of the city and will return August 19." Do you
13 see that?
14 A. Yes.
15 Q. So approximately seven months after the deadwood
16 file, and also seven months after Mr. Pritchard's
17 file -- or memo to Mr. Hardwick, Mr. Wells is
18 shipping documents to Anne Johnson without a cover
19 letter identifying the documents; correct?
20 A. Well that's what the letter indicates. I don't
21 know if those documents referred to in this letter
22 have any connection to the documents that he referred
23 to in his previous memo of seven months prior.
24 Q. Well you know that they're R&D reports; don't
25 you, sir?

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12086

1 A. Well it says R&D reports. I don't know which
2 R&D reports.
3 Q. It says B.A.T R&D reports; doesn't it?
4 A. Yes.
5 Q. Now at this point in time had Mr. Pritchard
6 taken over at B&W?
7 A. I -- I don't know.
8 Q. Do you know how many documents were sent to Anne
9 Johnson?
10 A. No. The -- this memo doesn't indicate. I'm --
11 I don't even know who Anne Johnson is. But this memo
12 doesn't indicate how many documents or what the
13 reason is or -- or any particular connection to the
14 memo that was written seven months prior.
15 Q. If I told you Anne Johnson was a BATCo employee,
16 would that help you at all?
17 A. Well it would -- it would make me think that it
18 wasn't the deadwood documents.
19 Q. It would.

20 A. Yes.
21 Q. Okay. Now when you don't identify documents,
22 once again you don't leave a paper trail as to what
23 those documents are; do you?
24 A. No.
25 Q. Can you direct your attention now, sir, to
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12087

1 Exhibit 26210, which is the next document.
2 A. Oh, okay.
3 Q. And this is a memo to Mr. Pritchard; correct?
4 A. Yes.
5 Q. From Mr. Wells; correct?
6 A. Yes.
7 Q. Dated November 17th, 1989; correct?
8 A. Yes.
9 Q. And the title is "Arguments About Documents."
10 Correct?
11 A. Yes.
12 MR. CIRESI: Your Honor, we would offer
13 Exhibit 26210.
14 MR. BERNICK: Your Honor, I have an
15 objection to this. I'd like to be heard at side-bar
16 briefly. It pertains to other countries.

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12088

1 (Side-bar discussion as follows:)
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12089

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12092

1 (Side-bar discussion concluded.)
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1 MR. CIRESI: Your Honor, we'd offer Exhibit
2 26210.
3 THE COURT: Court will receive 26210.
4 BY MR. CIRESI:
5 Q. Now Dr. Appleton, this is the memorandum from

6 Mr. Pritchard; correct?
7 A. Yes.
8 Q. Do you know if at this time he was the B&W CEO?
9 A. He may have been. I just -- I simply don't know
10 what his -- what his tenure was.
11 Q. Okay. This again is from Mr. Wells; correct?
12 A. Yes.
13 Q. And on the left-hand side is the legend
14 privileged and confidential, produced as required by
15 the court's March 7th, --
16 A. Yes.
17 Q. -- 1998 order.
18 A. I see that.
19 Q. Now let's go through this, sir. In the first
20 paragraph it states, "Pursuant to our conversation,
21 this memorandum presents a synopsis of arguments that
22 is crucial to avoid the production of scientific
23 witnesses and documents at this time even if
24 production were to occur in the indefinite future."
25 Correct?

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1 A. Yes.
2 Q. Now what Mr. Wells is saying here is that B&W is
3 going to avoid producing documents and witnesses;
4 correct?
5 A. It says he's presenting a synopsis of arguments
6 concerning that. I don't know if he says they're
7 actually going to do that or not.
8 Q. Well he says we're going to avoid the
9 production; correct?
10 A. Well it says he's --
11 He's presenting arguments about the pros and
12 cons of doing that. It seems he's giving legal
13 advice about how to defend potentially pending
14 litigation. It seems to me --
15 It's a synopsis of arguments, is what it says.
16 Q. Legal advice to avoid production of documents
17 and witnesses; is that what you're saying?
18 MR. BERNICK: Your Honor, that's the third
19 time the question has now been posed. The witness
20 has answered it.
21 THE COURT: I think he's answered it.
22 THE WITNESS: I'm sorry?
23 MR. CIRESI: We'll go on.
24 THE WITNESS: All right.
25 Q. "Plaintiffs" --

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1 THE WITNESS: I -- I'm sorry, Your Honor, I
2 didn't hear what you said.
3 THE COURT: Well I guess you needn't answer
4 it, unless you insist on answering it.
5 THE WITNESS: Please go on.
6 Q. "Plaintiffs can argue certain statements in the
7 documents demonstrate that scientists of the company
8 accepted causation as addiction." See that?
9 A. Yes.
10 Q. And you remember the document that we saw

11 yesterday that was talking about the difficulties of
12 getting documents out where internal people and
13 consultants admitted and accepted causation?
14 A. Yes.
15 Q. And what Mr. Wells is addressing here is the
16 very precise issue that we saw in that other
17 document; correct?
18 A. Yes.
19 Q. "In addition, large numbers of documents with
20 difficult statements with wear away the credibility
21 of the witness's explanation." Correct?
22 A. That's what it says, yes.
23 Q. So what he's suggesting here is that all of
24 these documents, internal documents get out, and if
25 some witness had tried to explain away a position,

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1 that those documents would undermine and wear away
2 any credibility that witness may have; correct?
3 MR. BERNICK: Object to the
4 characterization. The document says what it says.
5 These are Mr. Ciresi's words now.
6 THE COURT: You may answer the question.
7 A. It seems to me he's -- he's doing what lawyers
8 do, he's presenting a legal analysis of apparently
9 pending litigation and the potential impact of
10 various documents and various statements in documents
11 on that, and apparently weighing pluses and minuses
12 and giving opinions about what may strengthen or
13 weaken the case in his -- in his view. It seems to
14 me that's what -- that's what lawyers spend a lot of
15 time doing.

16 Q. Well you don't mind if I take issue with what
17 you think lawyers do; do you, sir?

18 MR. BERNICK: Your Honor, object to the
19 commentary by counsel and move that it be stricken.

20 THE COURT: Yes, that's commentary,
21 counsel. That will be stricken.

22 BY MR. CIRESI:

23 Q. The next number, number two, "The witness
24 probably -- probably will be unprepared to explain
25 the documents adequately to preserve credibility for

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1 the management's statements on smoking and health."
2 Do you see that?

3 A. Yes.

4 Q. Now management's statements at Brown &
5 Williamson in 1989 and right up to today on smoking
6 and health is that smoking does not cause disease;
7 correct?

8 A. No, that's not correct.

9 Q. Has B&W ever stated publicly in writing that
10 smoking causes disease?

11 A. We've -- we've talked about what the evidence
12 shows, that you've got epidemiology that's -- that
13 indicates it's a risk factor, that it may very well
14 cause disease, then we've talked about the
15 experimental evidence and what it shows and what it

16 doesn't show when you look at this from a technical
17 point of view and a scientific point of view, and
18 we -- we've talked about that and we've presented
19 that sort of information publicly.
20 Q. Can you answer my question, doctor? Has Brown &
21 Williamson ever publicly stated smoking causes
22 disease?
23 A. I think I answered your question.
24 Q. Has it so stated?
25 A. I --

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1 The answer I gave you is the answer I gave you.
2 We have talked about the evidence concerning that,
3 and there's various types of evidence. We've talked
4 about what we think the various types of evidence
5 show.
6 Q. That's not what I asked you, sir. Let me -- let
7 me make it a little more simple. Has Brown &
8 Williamson taken out an ad in the paper, like they
9 did with the Frank Statement in 449 papers across the
10 country, and said we admit smoking causes lung
11 cancer? Have they done that?
12 A. Well I think before we would do that, we would
13 weigh what would be the value to the consumer to do
14 that, and if the intent would be to convey
15 potentially the health risks of smoking, I think
16 that's best left to the public health authorities,
17 and they do that. And --
18 Q. Sir, --
19 A. -- they've done that. I don't see what value
20 there would be.
21 Q. -- can you answer my question? Can you answer
22 my question?
23 A. Well I'm trying to, sir.
24 Q. No, you haven't answered it, sir.
25 Has Brown & Williamson ever taken out an ad and

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1 said that? "Yes" or "no."
2 A. Again, before we would do that, we would --
3 We wouldn't do it unless we thought there was a
4 value to the consumer. Insofar as warning them of
5 the health risks of smoking, we think that the
6 consumer should be warned, and we believe that they
7 have been warned. And the most appropriate way to do
8 that is through the public health authorities. I
9 don't know why we would do that. I don't know what
10 value to the consumer that would have.
11 Q. Is your answer no?
12 A. We have not taken out an ad that has the words
13 you mentioned.
14 Q. Because you want to shift responsibility to some
15 government agency to warn rather than the company
16 itself warning its consumers; correct?
17 MR. BERNICK: Your Honor, Your Honor, both
18 in the tone of counsel's voice and in substance that
19 is argumentative and improper.
20 THE COURT: No, you may answer that.

21 A. We think it's extremely critical that consumers
22 are aware of the health risks of smoking. The issue
23 is who should provide that information. I think it's
24 most appropriate for government health officials to
25 do that. That's what their role is. In fact, one

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1 may even argue if we did it it may pose a conflict of
2 interest. The public health authorities have taken
3 on that responsibility. They've done a good job with
4 it, and we think that consumers have been adequately
5 warned. We're satisfied the consumers are aware of
6 the -- of the health risks of smoking.

7 Q. Point to me one statement of any public health
8 authority that says we take on the tobacco industry's
9 responsibility to warn consumers, and they do not
10 have to warn consumers.

11 MR. BERNICK: Your Honor, I --

12 Q. Point to one such statement.

13 MR. BERNICK: I object. This is a matter
14 of congressional legislation. There's a Supreme
15 Court opinion.

16 THE COURT: You may answer the question.

17 A. I'm sorry, I'm not even sure I followed the
18 question. Can you please repeat it?

19 Q. Sure. Point me to one statement of any public
20 health authority that says we take on the tobacco
21 industry's responsibility to warn consumers and they
22 do not have to warn consumers. Point to one such
23 statement.

24 MR. BERNICK: Same objection, Your Honor.

25 THE COURT: I've ruled on that, counsel.

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1 MR. BERNICK: Okay.

2 A. Well I don't know if there is such a statement,
3 but I do know that Congress has apparently mandated
4 that warnings go on the pack, and my understanding of
5 how the legislation is constructed, although I'm not
6 an expert in this area, I'm a scientist --

7 Q. Are you speculating?

8 A. -- is that --

9 MR. BERNICK: Excuse me. The witness was
10 interrupted.

11 A. I'm giving my understanding of -- of what I --
12 what I believe the laws are and what the regulations
13 are. I'm -- I'm trying to respond to your questions,
14 sir, the best I can.

15 Q. You understand --

16 A. I may or may not be completely accurate, but my
17 belief is that Congress specifically prohibits
18 tobacco companies from modifying those warnings. I
19 may be wrong, but that's my understanding, that they
20 have indicated that they're the ones that dictate
21 what the warning -- warning will be.

22 Q. Who told you that?

23 A. I don't even --

24 I don't know exactly where I -- where I gained
25 that understanding. And I may be wrong, but that's

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1 my understanding.
2 Q. You have no idea where you learned that --
3 A. No.
4 Q. -- alleged statement?
5 A. I -- I don't know if I read it. I don't know.
6 I don't remember where -- where I got that
7 information.
8 Q. You do --
9 You do understand that at the conclusion of this
10 case the court will instruct the jury on what the law
11 is. Do you know that?
12 A. I assume that's the case, yes.
13 Q. And the court will instruct with respect to
14 whether or not the companies, as contrasted with the
15 government, has a duty to warn. You understand that;
16 don't you?
17 A. I assume that that will be part of the process.
18 Q. Now back to Exhibit 26210. Mr. Wells goes on to
19 state, "The witness perhaps could be prepared to
20 survive superficial questioning on the documents
21 produced now. However, he is likely to be confronted
22 with additional waves of documents." Do you see
23 that?
24 A. Yes.
25 Q. "He also would be unprepared to deal with a

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1 sharp cross-examination on the smoking and health
2 questions certain to be suggested by government
3 experts." Do you see that?
4 A. Yes.
5 Q. Now the more information that is in the hands of
6 someone seeking the truth through cross-examination,
7 the better that person will be able to examine a
8 witness on a subject matter; correct, sir?
9 A. I think it depends on what information they have
10 and what the circumstances of the cross-examination
11 are, and of -- you know, just the whole circumstances
12 of it. Depends on what information. I can't
13 necessarily say yes, they will have -- be in a better
14 position or not a better position.
15 Q. Well you would certainly agree as a scientist
16 that the more information you have on a subject
17 matter, the better able and better equipped you are
18 to discuss the subject matter.
19 A. In a scientific arena, yes. But when you say
20 "cross-examination," now we're moving to a litigation
21 arena which has very specific rules and
22 technicalities about what can be discussed and what
23 can't be discussed and what evidence can be entered
24 in, what evidence can't be entered in. It's a
25 completely different arena that I'm not entirely

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1 familiar with. Scientists don't do that. They --

2 they talk about everything that's out there and all
3 the information that's available. And so in a
4 scientific arena, certainly, the more information you
5 have, the better equipped you are to deal with the
6 issues. I don't know if that automatically
7 translates in a legal environment.

8 Q. Okay. Fair enough.

9 In a scientific environment, then, I think you
10 said the more information that's out there, the
11 better equipped scientists are to discuss a specific
12 area; isn't that right?

13 A. Yes.

14 Q. Because all that information, be it from company
15 files, from independent investigators, wherever,
16 leads to a robust record for scientists to evaluate
17 and discuss; correct?

18 A. Potentially, yes.

19 Q. That's the reason that you want to get all of
20 the information out for scientists to be able to
21 discuss it; correct, sir?

22 A. As I indicated, the more information that's out
23 there, particularly unique and novel information, the
24 better equipped people are to address the issues.

25 Q. And if one party to that scientific inquiry is

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1 playing hide-the-ball and they're not putting out all
2 the information so people can evaluate it, that can
3 impair the scientific discussion; can't it?

4 A. Well I think it depends on if, number one, if
5 it's in fact happening, and number two, what
6 information is being hid, if any information is being
7 hid at all.

8 Q. But you certainly wouldn't want to let the hider
9 determine whether or not the information will be
10 important to people who are not hiding; would you, as
11 a scientist?

12 MR. BERNICK: Objection to the form of the
13 question, and it's argumentative.

14 THE COURT: You may answer that.

15 A. I'm sorry, could you repeat the question? I'm
16 not even sure --

17 Q. Sure.

18 A. -- I'm completely following you.

19 Q. You certainly wouldn't want the hider to
20 determine whether or not the information will be
21 important to those scientists who want to get at all
22 the information; would you?

23 A. I'm not even sure what --

24 Can you please repeat your question?

25 Q. Sure. Let me make it simple.

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1 A. It's hard --

2 Or maybe even rephrase it. I'm not sure I
3 completely even follow it.

4 Q. All right. You would expect, sir, that as a
5 scientist, if someone else was hiding information
6 from you, you wouldn't want that person to determine

7 what might be important or not important; would you?
8 A. No, I would not.
9 Q. No.
10 You would want independent, objective scientists
11 to be able to look at all the information at given
12 points in time to determine what people knew, when
13 they knew it, and what the effect of that was from a
14 scientific standpoint; correct?
15 A. Well when you say "all the information," I mean
16 to a degree. When -- when I look at the published
17 literature, I know that I'm looking at a finished
18 published manuscript that's been peer reviewed. Now
19 I know that there's a lot of underlying information
20 leading up to that that I don't see, and that there's
21 just no practical way to do that. So what people do
22 and what science is about is they -- they prepare
23 reports based on the information, they get it peer
24 reviewed. If it survives the peer-review process, I
25 think the assumption is that it's reasonable and it

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1 hasn't been over-interpreted or under-interpreted.
2 So I do rely on finished published papers, and I
3 don't have to necessarily receive all the underlying
4 raw data and everything that led up to that finished
5 paper. So I'll agree with you to a point --
6 Q. All right.
7 A. -- but not say I have to have everything. It's
8 just impossible. That's simply not possible.
9 Q. Well scientists don't rely on just peer-reviewed
10 literature.
11 A. No, not solely on peer-reviewed literature.
12 Q. Now --
13 And if the articles that you're relying on were
14 slanted or distorted with regard to sensitive
15 information, you'd want to know if that had taken
16 place as a scientist so that you could take a look at
17 the underlying information to ascertain whether there
18 was any importance or significance to that slanting
19 or distorting; wouldn't you?
20 A. I would assume, if I'm looking at a
21 peer-reviewed published paper, that it has survived
22 the peer-review process, which means it hasn't been
23 over -- grossly over- or under-interpreted and that
24 it couldn't be slanted to any great extent, because
25 the data speaks for itself, the data is the data.

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1 Now if someone is over- or under-interpreting,
2 then hopefully the peer-review process would pick
3 that up. I rely mostly on peer-reviewed published
4 literature when I'm looking at external research.
5 Q. Even in peer-reviewed literature, sir, when
6 information is drawn, if the underlying information
7 was slanted, someone reading that peer-reviewed
8 article wouldn't have the foggiest notion it was
9 slanted; would they?
10 MR. BERNICK: Object to the form of the
11 question. It's really very ambiguous what's being

12 referred to.

13 THE COURT: Do you understand the question?

14 THE WITNESS: Well sort of.

15 Q. I mean this whole line, I'm having trouble
16 following you, but all I can say is this: I think
17 anybody can slant anything at any time. So just
18 because something is in a peer-reviewed journal is
19 not a guarantee that it hasn't been slanted. But I
20 think it's the best assurance that's available to us.
21 It's the best we have.

22 Q. And certainly the tobacco industry, B&W and R&J,
23 with your personal experience, has not turned over
24 all of its underlying data to federal government; has
25 it?

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1 A. Well I don't know what all -- all these
2 activities are, and I --

3 Frankly, these documents, I'm seeing them for
4 the first time. I can tell you what I have seen. I
5 have seen that technical reports that indicate a
6 massive research effort to do safe cigarette
7 research.

8 Q. Sir --

9 A. So apparently that wasn't hidden to me. I don't
10 know if we published that, I don't believe it was
11 published, but I also don't believe that any of the
12 findings represent anything particularly novel or new
13 that wasn't already known in the scientific
14 community.

15 Q. But you work for the company and you've drawn
16 that conclusion; right?

17 A. Yes.

18 Q. Okay. Now my question was a little different.
19 Brown & Williamson and RJR, to your knowledge, hasn't
20 turned over all of their information regarding
21 smoking and health to any government agency; has it?

22 A. Well they -- they've published actually a great
23 deal of information. They've published a lot of
24 reports and a lot of studies. I don't believe
25 they've published everything. I don't think any

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1 company publishes all of its internal research.

2 Q. Sir --

3 A. But we have certainly published a lot.

4 Q. Do you know any other industry where it's
5 reported that its product kills over 400,000 people a
6 year?

7 A. Not right offhand.

8 Q. You can't think of a one; can you?

9 A. No.

10 Q. Ever in the history of the world can you think
11 of such a product; can you?

12 A. Well not right offhand, no.

13 Q. There's not a product that comes anywhere near
14 it in terms of what's been reported in terms of death
15 and disease that it causes; isn't that right?

16 A. As far as awareness of the health risks of

17 smoking, I don't know of any product that has the
18 awareness of the potential health risk that tobacco
19 carries, no.
20 Q. Sir, and the greater the risk, as you call it,
21 the greater the danger, the more essential it is that
22 all information get out. Wouldn't you agree?
23 A. I think information that's unique, that would
24 make a significant contribution to the body of
25 knowledge, if that wasn't already known, is

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1 important. The research that I've looked at
2 concerning safe cigarette research, as I indicated,
3 were all based on tests and screens. The reason why
4 we employed those is because somebody else had
5 already done that test, had put cigarettes through
6 those tests, had made reports in the scientific
7 literature and said this is what cigarette smoke
8 does. And we said okay, this is what's important,
9 we're going to employ these tests to see if we can
10 make our products safer. So the research that we're
11 talking about, that I'm talking about, isn't anything
12 that's new or that wasn't known in the scientific
13 community. It's out there. That's why we picked it
14 up and used those tests.

15 Q. That's not what the Journal for the American
16 Medical Association said; is it?

17 A. Well the Journal of the American Medical
18 Association says a lot of things. It's a huge
19 journal and publishes every month. What are you
20 referring to?

21 Q. I'm talking about the articles that were in the
22 journal that said that your company concealed
23 information. You're aware of that; aren't you?

24 A. I've read those articles. It depends on what
25 information you're referring to. If you have a

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1 specific study in mind, I'll be happy to give a
2 comment as to whether or not I think, if we published
3 that, it would have made a difference to the
4 scientific community.

5 Q. No. I'm asking you whether or not doctors in
6 the Journal for the American Medical Association, who
7 were not employed by the industry, said that your
8 company, Brown & Williamson, spread confusion and
9 obfuscated the scientific debate. Was that said,
10 sir?

11 A. Well if you're referring to the papers published
12 by Stanton Glantz, I've read those. I am aware of
13 what his statements are. I think the -- the -- the
14 best way I could deal with it is if you give me a
15 specific example of -- of a type of research or a
16 study that was allegedly suppressed by us, I can give
17 you an opinion as to whether or not that would have
18 made a difference in the overall view of the
19 scientific community concerning smoking and health.
20 I'll be happy to comment on that if you give me a
21 specific example.

22 Q. That's not what I'm asking you. I'm asking you
23 whether scientists out there, not employed by the
24 tobacco industry, have said that your company spread
25 confusion, obfuscated, and duped the public. Did
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1 they say that?
2 A. I'm -- not those exact words, but that is --
3 that is among the messages that were conveyed by
4 Stanton Glantz in the papers that I believe you're
5 referring to.
6 Q. How about Dr. Koop? How about Dr. Kessler?
7 They said you hid evidence; didn't they?
8 A. Well I'm not --
9 If you give me a specific statement, I -- I'll
10 either confirm it or --
11 I'm aware they said a lot of things.
12 Q. Can you direct your attention to Exhibit 24346.
13 A. Is it in the same volume here?
14 Q. Volume two.
15 A. Okay.
16 Q. This is an article "Reinventing American Tobacco
17 Policy, Sounding the Medical Community's Voice;"
18 correct?
19 A. Yes.
20 Q. Written by Dr. C. Everett Koop, former Surgeon
21 General of the United States of America; correct?
22 A. Yes.
23 Q. Written by Dr. David C. Kessler, former head of
24 the Food and Drug Administration; correct?
25 A. Yes.

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1 Q. He is the one who in 1994, after documents
2 started coming out in Congress, undertook to regulate
3 cigarettes as a drug; correct?
4 A. Yes.
5 Q. And from Dr. George D. Lundberg; correct?
6 A. Yes.
7 Q. And if you go to the first page and you go over
8 to the right-hand column, first full paragraph, they
9 reported in JAMA in 1998, "For years, the tobacco
10 industry has marketed products that it knew caused
11 serious disease and death. Yet, it intentionally hid
12 this truth from the public, carried out a deceitful
13 campaign designed to undermine the public's
14 appreciation of these risks, and marketed its
15 addictive products to children. The industry knew --
16 long ago knew that nicotine was addictive but kept
17 its findings secret and consistently denied the fact,
18 even as overwhelming evidence to the contrary
19 eventually emerged.
20 "By these actions, the tobacco makers have shown
21 themselves to be a rogue industry, unwilling to abide
22 by ordinary ethical business rules and social
23 standards." That's what they reported; correct?
24 A. That's what the document says, that's correct.
25 Q. And if you go down to the next paragraph, "By

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12115

1 contrast, the tobacco industry has intentionally
2 designed and marketed lethal products and
3 deliberately hidden their well-known risks;" correct?
4 A. That's what the document says.
5 Q. And what they're doing is they're contrasting
6 the tobacco industry with the automobile industry
7 there, for if you go to the preceding paragraph,
8 you'll see where they say, "For example, design
9 defects in a motor vehicle are unintentional; when
10 they are discovered, steps are taken to correct them.
11 Nevertheless, such manufacturers are held liable for
12 these mistakes." Do you see that?
13 A. Yes.
14 Q. And if you turn to Exhibit -- well if you -- if
15 you go on to the next page first, sir --
16 Actually, let's start at the bottom of the same
17 page.
18 A. Okay. Yeah. I'm following on the screen here
19 instead of --
20 Q. Okay. Do you have it?
21 A. Well it's on the screen.
22 Q. Okay.
23 A. I see the screen.
24 Q. "Incredibly, even though some in the tobacco
25 industry have now acknowledged some smoking-related

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12116

1 health consequences and addictive properties, they
2 have offered no apology and have the audacity to deny
3 wrongdoing. Even worse, manufacturers have launched
4 the greatest lobbying campaign ever known, tens of
5 millions of dollars just in 1997, in an attempt to
6 receive from Congress pardons for all its past and
7 future liability. Some of its audacious requests
8 would require making exceptions to the fundamental
9 rights of due process for individuals, while others
10 would override state and community rights." Correct?
11 A. That's what the document says, yes.
12 Q. Then it goes on to talk about the Mississippi
13 and the Florida case, and it talks about the
14 Minnesota case; correct?
15 A. Yes.
16 Q. And it said, "If the whole truth were known (and
17 much more may come out during the Minnesota court
18 case), we believe members of Congress would have to
19 distance themselves completely from the industry;"
20 correct, sir?
21 A. That's what the document says, yes.
22 Q. And what I've been asking you about for the last
23 half a day are documents that came out within the
24 last week; aren't I?
25 A. I don't know when they came out. I --

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12117

1 Q. Well --
2 A. I assume that that may be. I know there was a

3 big release of documents I've read in the paper, but
4 I'm --
5 Q. And sir --
6 I don't want to know about the paper. Remember,
7 I told you about that earlier. Okay?
8 A. Sorry.
9 Q. Can't know -- can't know about papers. All
10 right?
11 A. Okay.
12 Q. And sir, you first saw these documents over the
13 last few days; correct?
14 A. Well these are ones that you've designated for
15 my cross-examination, so they were sent over and I
16 reviewed them.
17 Q. Your lawyers didn't show them to you before I
18 designated them; did they?
19 A. No.
20 Q. So you never saw them until we designated the
21 documents and asked you to read them; is that right?
22 A. With the exceptions of bits and pieces that have
23 been published in articles like the Journal of the
24 American Medical Association and other places -- some
25 of these things have been out in the public now for a
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12118

1 while. Some of them I've seen either in whole or
2 quotes, but by and large the majority of the ones
3 we've talked about the last couple of days are ones
4 that I've only seen in the last day or two.
5 Q. Because that's the first time they've seen the
6 fresh air of the light of day; is that right, sir?
7 A. Well because you designated these and sent them
8 over, and I reviewed them for that reason.
9 Q. And if you go to Exhibit 18989 --
10 A. Same binder?
11 Q. Same volume. First document, sir. Very first
12 document in the volume.
13 A. Well mine says 19 --
14 Q. I'm sorry. 18989.
15 A. That must be the other binder. Yeah.
16 Q. Are you in volume two?
17 A. Well I don't know, but this one --
18 Unless I've got it backwards or something.
19 Q. You're right. It will be in the -- the last one
20 of volume one. I was going to make it easier for you
21 and I made it harder; I put it in the same volume.
22 A. All right. 18989.
23 Q. Correct.
24 A. Yeah, I got it.
25 Q. And this refers to the Brown & Williamson
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12119

1 documents; correct?
2 A. Yes.
3 Q. And it's signed by a number of doctors out
4 there; correct? If you look at the last page.
5 A. Yes.
6 Q. And they say, "On behalf of the physicians of
7 this country and the people they serve, the AMA

8 pledges its best efforts to the eradication of
9 tobacco-related disease. We solicit the support of
10 the public and our government in this endeavor. It
11 is a worthy cause." Then they list their names;
12 correct?
13 A. Yes.
14 Q. And this is a document that was in the JAMA,
15 1995, volume number 274; correct?
16 A. Yes.
17 Q. That is the premier peer-reviewed journal for
18 doctors in this country, outside of the New England
19 Journal of Medicine; correct?
20 A. Well it's certainly one -- it's a big one. I
21 think it's one that represents the American Medical
22 Association.
23 Q. Goes to all the doctors; correct?
24 A. I don't know if it goes to all of them, but it's
25 certainly one of the major journals that they -- that
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12120

1 they read.
2 Q. Now if you go to page one, in the right-hand
3 column, talking about the Brown & Williamson
4 documents, these doctors state, "The documents show:
5 "that research conducted by tobacco companies
6 into the deleterious health effects of tobacco was
7 often more advanced and sophisticated than studies by
8 the medical community." Correct?
9 A. That's what it says. I don't agree with that,
10 but that's what it says.
11 Q. But that's what these doctors said; didn't they,
12 sir?
13 A. Yes.
14 Q. Okay. And --
15 A. The only thing, I could comment if I had an
16 example.
17 Q. Sir, and these doctors did not even have all the
18 documents that have been produced in this case; did
19 they?
20 A. I doubt -- I doubt it.
21 Q. And the third bullet point says "that the
22 industry decided to conceal the truth from the
23 public;" correct?
24 A. The third bullet?
25 Yes, that's what it says.

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12121

1 Q. And if we go down under the last bullet point,
2 to the paragraph, "We think...."
3 A. Yes.
4 Q. Do you see that? "We think these documents and
5 the analyses merit the careful attention of our
6 readership" --
7 And those are doctors; correct, by and large?
8 A. I believe that's what it indicated, yes.
9 Q. Okay. JAMA, the Journal for the American
10 Medical Association, goes out to doctors throughout
11 this country; correct?
12 A. Yes.

13 Q. In fact, it goes throughout the world; doesn't
14 it?
15 A. I believe so.
16 Q. It goes to toxicologists; doesn't it?
17 A. Yes.
18 Q. All kinds of scientists can take subscriptions
19 to the Journal for the American Medical Association;
20 can't they?
21 A. Yes.
22 Q. And so these doctors are saying that the
23 documents and the analyses merit the careful
24 attention of the readership "because they provide
25 massive, detailed, and damning evidence of the
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12122

1 tactics of the tobacco industry. They show us how
2 this industry has managed to spread confusion by
3 suppressing, manipulating, and distorting the
4 scientific record." That's what they say; don't
5 they?
6 A. That's what it says.
7 Q. These are doctors, not ordinary consumers who
8 don't generally read medical journals; correct?
9 A. That's correct.
10 Q. And you would agree that the average consumer
11 doesn't read medical journals; wouldn't you?
12 A. Probably not.
13 Q. And these doctors are saying that the industry,
14 including your company, spread massive confusion;
15 correct?
16 A. That's what the document says.
17 Q. And they suppressed and manipulated and
18 distorted the scientific record; correct?
19 A. That's what the document says.
20 Q. And on the next page, sir, they say "Why are we
21 publishing these articles?" Do you see that?
22 A. Yes.
23 Q. "For many decades, the mission of the American
24 Medical Association has been to 'promote the science
25 and art of medicine and the betterment of public
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12123

1 health.' To remain silent about the B&W papers would
2 be to deny our mission. Quite simply, we are
3 publishing this research because it is the right
4 thing to do.
5 "Analysis of these papers suggests that we
6 would have seen a very different picture of tobacco
7 use today if the group knowing the most about the
8 dangers of tobacco use, the industry, had been honest
9 with its customers." That's what they reported;
10 didn't they, sir?
11 A. That's what the document says.
12 Q. And do you know or have you seen any study of
13 how many youth under the age of 18 have started
14 smoking since your industry pledged to the American
15 people in the Frank Statement that we accept an
16 interest in people's health as a basic
17 responsibility, paramount to every other

18 consideration in our business? Do you know how many?
19 A. I've seen reference to studies on youth smoking,
20 but I don't know what the estimate of the numbers are
21 since 1954.

22 Q. Tens upon tens of millions; isn't that right?

23 A. I don't know what the number -- what the number
24 is.

25 Q. You've seen studies that say three thousand

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12124

1 children a day start smoking; haven't you?

2 A. Yes, I've seen studies that indicate that.

3 Q. That would be tens of millions over that
4 four-decade period of time where you made this
5 pledge; wouldn't it, sir?

6 A. I don't know. I -- I can't make an estimate.
7 The -- the studies that are talking about recent
8 times, I don't know if they are reflective of what
9 was happening back in 1954 or not.

10 Q. Do you have any idea how many people have died
11 as a result of smoking-related diseases during that
12 period of time?

13 A. No.

14 Q. You do know it's reported to be over 400,000 a
15 year; don't you?

16 A. I'm familiar with those reports, yes.

17 Q. And sir, scientific information comes from
18 company files; doesn't it?

19 A. Well scientific information comes from a lot of
20 places. We also have scientific information. By and
21 large, the overwhelming majority of scientific
22 information comes from the scientific community.

23 Q. I asked you if it can come from the files of the
24 companies themselves, sir.

25 A. It can come from a lot of places, including

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12125

1 company files.

2 Q. Now if we could go back to Mr. Wells' letter.

3 A. Which volume?

4 Q. 26210. In 1989 --

5 A. Is that in volume two?

6 Q. It is, sir.

7 A. And I'm sorry, what was the tab again?

8 Q. 26210.

9 A. Got it.

10 Q. Now we were at that point right after -- we were
11 at number two. Do you see that, "The witness
12 probably will be unprepared to explain the documents
13 adequately to preserve the credibility for the
14 management statements on smoking and health." You
15 remember where we were?

16 A. Yes.

17 Q. And we went off on whether or not the government
18 should be warning. Do you remember that?

19 A. Yes.

20 Q. All right. And then Mr. Wells goes on, "The
21 witness perhaps could be prepared to survive
22 superficial questioning on the documents produced

23 now. However, he is likely to be confronted with
24 additional waves of documents." Do you see that?
25 A. Yes.

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12126

1 Q. If you go on to the next page, number four, it
2 states, "It is important to avoid production of the
3 documents as long as possible." Do you see that?
4 A. Yes.
5 Q. And do you know how long Brown & Williamson was
6 able to avoid production of their internal documents?
7 MR. BERNICK: Objection, lack of
8 foundation, assumes facts not in evidence, and this
9 document relates to Canadian litigation.
10 THE COURT: You may answer if you know.
11 A. I don't know. I'm not involved in the document-
12 production process, but I have no indication that any
13 documents were improperly withheld from production.
14 But I just don't know that much about the process.
15 Q. You see the reference in the next paragraph to
16 Dewey, D-e-w-e-y?
17 A. Yeah. At the bottom of the paragraph?
18 Q. Yes.
19 A. I see the word Dewey.
20 Q. And to Haines?
21 A. Yes.
22 Q. Those are U.S. cases. Are you aware of that?
23 A. No.
24 Q. When you got your orientation from Shook, Hardy
25 & Bacon, they didn't tell you about that?

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12127

1 A. They may have, but that was seven years ago. I
2 haven't looked at -- I haven't looked at those notes
3 since then, other than yesterday. I don't remember.
4 Q. So the first time you looked at your own notes
5 from the meeting you had with Shook, Hardy & Bacon
6 immediately after you started with Brown & Williamson
7 was yesterday.
8 A. Either yesterday or the day before.
9 Q. Do you know during the period 1954 to 1994 how
10 many documents were produced by Brown & Williamson in
11 litigation?
12 A. No, I don't.
13 Q. If I asked you to assume that it's 1350
14 documents, would you make that assumption?
15 MR. BERNICK: Your Honor, that's an
16 improper assumption to ask the witness to make.
17 There is no predicate showing during the course of
18 this entire trial that relates to the subject matter,
19 nor are we talking about years of cases and documents
20 requests. There's a lack of foundation for this line
21 of questioning.
22 MR. CIRESI: Your Honor, may I approach the
23 witness?
24 THE COURT: You'll have to lay a foundation
25 for that question, counsel.

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1 MR. CIRESI: May I approach the witness?
2 THE COURT: All right.
3 (Document handed to the witness.)
4 BY MR. CIRESI:
5 Q. Sir, I've handed you a deposition of Richard M.
6 Lowther. You know who he is.
7 A. I'm vaguely familiar with him. I've never met
8 him.
9 Q. He's with --
10 He's with Brown & Williamson.
11 MR. BERNICK: Your Honor, before there's
12 any further questioning along these lines, I'd like
13 to approach the court at the side-bar about the
14 proprietary of this examination.
15 THE COURT: Why don't we take a short
16 recess, and counsel can approach the side-bar.
17 THE CLERK: Court stands in recess.
18 (Recess taken.)
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1 (In-chambers conference as follows:)
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(In-chambers conference concluded.)

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12142

1 THE CLERK: Please rise. Court is again in
2 session.
3 (Jury enters the courtroom.)
4 THE CLERK: You may be seated.
5 MR. BERNICK: Your Honor, I have a brief
6 follow-up on the side-bar that we had just before we
7 broke.
8 THE COURT: All right.
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12143

1 (Side-bar discussion as follows:)
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(Side-bar discussion concluded.)
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12145

1 THE COURT: Ladies and gentlemen -- I need
2 to turn on my microphone -- any reference that you
3 have seen to claimed settlement figures in other
4 cases are irrelevant and you should disregard them.
5 Counsel, proceed.
6 MR. CIRESI: Thank you, Your Honor.
7 BY MR. CIRESI:
8 Q. Doctor, with regard to the deposition in front
9 of you, that's what I handed you right before we

10 broke. Do you recall that?
11 A. Yes.
12 Q. And I was asking you about the number of pages
13 that have been produced by Brown & Williamson from
14 1954 to 1994.
15 A. Yes.
16 Q. Do you recall that?
17 Now the deposition, as I indicated, is of
18 Richard Lowther, L-o-w-t-h-e-r, who, as you said, was
19 a -- is an employee of Brown & Williamson that you
20 don't know very well; is that correct?
21 A. No, I don't know him.
22 Q. He was, I will represent to you, produced as the
23 corporate designee on behalf of Brown & Williamson to
24 testify under oath on the documents that had been
25 collected and produced in smoking-and-health
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12146

1 litigation. Do you understand that?
2 A. Yes.
3 Q. All right. Can you direct your attention to
4 page 283 of his deposition.
5 A. Yes.
6 Q. Line eight.
7 A. Yes.
8 Q. "Question: My question is simple, sir: From
9 1954 to 1994, Brown & Williamson only produced a
10 total of 1350 pages in any individual product
11 liability smoking-and-health-related case. That's
12 true, isn't it, sir?
13 "Answer: I believe that's correct."
14 Do you see that?
15 A. Yes.
16 Q. All right. Before you testified, were you aware
17 that the total number of pages ever produced by Brown
18 & Williamson before this case was 1350 pages?
19 A. No.
20 Q. Now yesterday, sir, you talked about Mr. Jacob.
21 Do you remember that? The lawyer who represented
22 Brown & Williamson and RJR, you said?
23 A. I don't specifically recall, but I may have.
24 Q. Okay. And do you know if he also represented
25 other companies?

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12147

1 A. No, I don't know if -- if he did or did not.
2 Q. Okay. Can you direct your attention to Exhibit
3 26227, which would be in volume two. It's toward the
4 back, sir; it's maybe a third from the back.
5 A. Okay. I've got it.
6 Q. Do you see that this is a Philip Morris
7 interoffice memorandum?
8 A. Yes.
9 Q. Dated March 21, 1980, from William Dunn --
10 A. Yes.
11 Q. -- to Dr. Seligman?
12 A. Yes.
13 MR. CIRESI: Your Honor, we'd offer Exhibit
14 26227.

15 MR. BERNICK: No objection.
16 THE COURT: Court will receive 26227.
17 BY MR. CIRESI:
18 Q. Now you recall that I was asking you about
19 biological research and the fact that BATCo stopped
20 doing in-house biological research on whole animals
21 in 1985, and then we looked at that document that so
22 indicated?
23 A. Yes.
24 Q. If you could go to --
25 First of all, you see this is dated March 21,
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1 1980 from Mr. Dunn to Dr. Seligman, the nicotine
2 receptor program. Do you see that?
3 A. Yes. Yes, I do.
4 Q. And if you go over to the second page, do you
5 see the reference there to Ed Jacobs in the first
6 paragraph? Third line, sir.
7 A. Okay. I'm -- I'm -- I'm trying to get there. I
8 think I have to --
9 It's hard for me to read this particular
10 monitor.
11 Q. Okay. If you take a look at the hard copy in
12 front of you.
13 A. Yes.
14 Q. Okay. Now Mr. Jacobs represented the whole
15 industry; didn't he?
16 A. I don't know if he did or not.
17 Q. Are you aware of whether or not Mr. Jacobs
18 formed industry positions for companies to take?
19 A. I don't know if he did or not.
20 Q. Can you go back to the first page of this
21 document. Do you know who Dr. Abood is?
22 A. No.
23 Q. Have you ever heard of him?
24 A. No.
25 Q. Do you see in the first paragraph that Dr. Dunn
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1 here is talking about the topic of
2 psycho-pharmacology of nicotine?
3 A. In the first paragraph?
4 Q. Yes.
5 A. Yes.
6 Q. And he's also talking about an internal nicotine
7 analog program and the internal animal behavior
8 program?
9 A. Yes.
10 Q. And do you recall the document that we saw
11 yesterday from RJR talking about the gentlemen's
12 agreement and the fact that it appeared that Philip
13 Morris was doing some in-house animal research?
14 A. Yes, but I -- I forgot the date of that memo.
15 Q. I believe it was in 1981. Do you remember that?
16 A. I don't remember, but I'll accept -- I'll accept
17 that.
18 Q. Okay. And do you recall that it said that it
19 appeared that Philip Morris had been doing that for a

20 few years?
21 A. Yes.
22 Q. And that it would be -- and that that fact had
23 been communicated to all concerned?
24 A. Yes.
25 Q. Okay. Now if we go on to the next paragraph, it
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1 says, "The psychopharmacology of nicotine is a highly
2 vexatious topic. It is where the action is for those
3 doing fundamental research on smoking, and from where
4 most likely will come significant scientific
5 developments profoundly influencing the industry.
6 Yet it is where our attorneys least want us to be,
7 for two reasons." Do you see that?
8 A. Yes.
9 Q. "It is important to have these two reasons
10 expressed and distinguished one from another. The
11 first reason is the oldest and is implicit in the
12 legal strategy employed over the years in defending
13 corporations within the industry from the claims of
14 heirs and estates of deceased smokers: 'We within
15 the industry are ignorant of any relationship between
16 smoking and disease. Within our laboratories no work
17 is being conducted on biological systems.' That
18 posture has moderated considerably as our attorneys
19 of have come to acknowledge that the original carte
20 blanche avoidance of all biological research is not
21 required in order to plead ignorance about any
22 pathological relationship between smoke and smoker.
23 This is an important distinction that has been made
24 which is -- it is well to articulate: The acute,
25 transient, short-lived effects of nicotine upon a

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1 physiological system (among which are those effects
2 or that effect sought by the smoker) are wholly
3 independent of those alleged, cumulative, long-term
4 contributions of smoke compounds to disease
5 processes."

6 Next paragraph, "We are now being allowed to
7 conduct research on the immediate effects of nicotine
8 because of this distinction."

9 So you see there that there is a distinction
10 being made between the effect of nicotine apart from
11 the effect of smoking and disease. Do you see that?

12 A. Yes.

13 Q. "We can work with biological systems; we can
14 inject nicotine in rats and we can perform the
15 surgery required for implanting cannulae."

16 Do you know what that is?

17 A. Cannulae? Yes.

18 Q. What is that, sir?

19 A. It's a -- it's a tube used to insert into some
20 body part to -- to introduce a test material.

21 Q. Have you ever --

22 A. Or -- or you can also draw blood with it. It's
23 just a tube. It's typically put in a blood vein or
24 an artery.

25 Q. Have you ever used one?
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1 A. Yes.
2 Q. "But in doing so we are engaging in research on
3 the pharmacological action of nicotine, which brings
4 us to the second concern of our attorneys. This is a
5 more recent concern arising from increasingly
6 favorable prospects for the success of a legislative
7 effort to transfer authority for the regulation of
8 tobacco manufacture to a federal agency (F.D.A.)
9 known to have interests and powers antithetical to
10 the interests of the industry. Any action on our
11 part, such as research on the psychopharmacology of
12 nicotine, which implicitly or explicitly treats
13 nicotine as a drug, could well be viewed as a tacit
14 acknowledgment that nicotine is a drug. Such
15 acknowledgment, contend our attorneys, would be
16 untimely. Therefore, although permitted to continue
17 the development of a three-pronged program to study
18 the drug nicotine, we must not be visible about it."
19 Then we go on to the next page. "I have made
20 these observations not to ridicule but rather to
21 emphasize the vexatiousness of the topic. Everybody
22 is vexed. The Don Hoels and the Ed Jacobs" --
23 Now the Don Hoels and the Ed Jacobs, they
24 represented the industry as a whole; didn't they,
25 sir?

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1 A. I don't know if they did or not.
2 Q. Do you --
3 You don't know whether or not they set the
4 policy with regard to biological research?
5 MR. BERNICK: Your Honor, this is the
6 second time that this line has been pursued. There's
7 no foundation for this line of examination. It's not
8 been established that this witness is knowledgeable
9 about either counsel, who they represented, or what
10 they did.
11 THE COURT: Well counsel, can you lay some
12 information for that.
13 BY MR. CIRESI:
14 Q. Sir, do you see where there's a distinction
15 between the Don Hoels and the Ed Jacobs and the
16 corporate lawyers for Philip Morris?
17 A. Yes.
18 Q. And you've already testified that Jacobs, at
19 least, represented RJR and Brown & Williamson;
20 correct?
21 A. I'm sorry? I -- I was reading that. I -- I
22 didn't hear your question.
23 Q. You've already testified that Ed Jacobs
24 represented both RJR and Brown & Williamson; correct?
25 A. I don't recall. I may have.

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1 Q. And have you had dealings with Mr. Jacobs?
2 A. I have --
3 I've met him, yes.
4 Q. Okay. You know he represents the entire
5 industry; don't you?
6 A. I don't know that.
7 Q. You've never had that discussion with Mr.
8 Jacobs?
9 A. Represented the entire industry?
10 MR. BERNICK: Your Honor, this is -- this
11 is --
12 Q. Yes.
13 MR. BERNICK: -- the fourth time the
14 question has been posed. The witness has answered
15 each time.
16 THE COURT: He apparently doesn't know,
17 counsel.
18 BY MR. CIRESI:
19 Q. Now when you were at RJR, were you aware that
20 in-house biological research was not to be done by
21 RJR pursuant to a gentlemen's agreement?
22 A. When I was at RJR, not only was in-house
23 biological research being done, but they constructed
24 a toxicological testing facility on their premises to
25 conduct that research.

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1 Q. When did they --
2 A. That's completely contrary to my experience
3 while I was at RJR.
4 Q. When did they construct it, sir?
5 A. I don't know the exact date. It was in the
6 early '80s, mid-'80s.
7 Q. You started there in 1985?
8 A. Either '84 or '85.
9 Q. Was it in existence when you started?
10 A. No.
11 Q. Were you doing --
12 A. But work was being done.
13 Q. Were you doing any specific work in that
14 laboratory?
15 A. No.
16 Q. Do you know whether or not RJR or were you --
17 strike that.
18 Were you ever told whether RJR had closed down
19 an in-house biological research laboratory?
20 A. I was aware that there was a -- not a
21 laboratory --
22 Maybe there was a lab. But I was aware there
23 was a program which, you know, had its -- had its --
24 a finite period. It started, it progressed, and then
25 it was -- then it reached its conclusion, apparently.

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1 I mean I was aware that a program existed. I don't
2 know the details of it.
3 Q. Okay. So you don't know anything about the
4 details of how abruptly or anything else it was shut
5 down.

6 A. No.
7 Q. Nobody ever gave you --
8 A. Nor the circumstances related to it, no.
9 Q. Okay. Nobody ever provided you with any of that
10 information.
11 A. No details, no.
12 Q. Now after BATCo stopped in-house biological
13 research in 1985 --
14 A. I don't believe that was my testimony.
15 Q. Excuse me.
16 A. That was not my testimony.
17 Q. After BATCo stopped in-house biological research
18 on whole animals in 1985, did it ever start that type
19 of research again?
20 A. What type of research?
21 Q. In-house biological research on whole animals.
22 A. That was contracted out. That work was, --
23 Q. Okay.
24 A. -- you know, set in contract laboratories.
25 Q. So that from 1985 forward, as far as you know,
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1 that type of work was always contracted out to third
2 parties; correct?
3 A. My understanding is that they maintained in
4 vitro biological testing capabilities internally, and
5 took the decision essentially to outsource biological
6 research in contract laboratories. Very common
7 practice.
8 Q. And "in vitro" is in test tubes; is it not?
9 A. Well it means --
10 Essentially, yes. Either test tubes or glass
11 dishes. It means not in whole animals.
12 Q. And "in vivo" would be in whole animals;
13 correct?
14 A. That's correct. That's correct.
15 Q. And it's the in vivo type of research,
16 scientific research, that was contracted out, or, as
17 you say, outsourced to third parties in 1985, as far
18 as you know.
19 A. Yes.
20 Q. And that has continued up to this day; correct,
21 sir?
22 A. Yes.
23 Q. Or up to 1994 I should say; is that correct?
24 A. Up to 1994, yes.
25 Q. Okay. Can you direct your attention, then, to
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1 Exhibit 1981. It's the Surgeon General's report.
2 That would be, I think, to your right, sir.
3 A. In a folder?
4 Q. Yes. It would be a document on its own.
5 A. Right.
6 Okay.
7 Q. Do you have that, sir?
8 A. Yes.
9 Q. Now have you read the 1981 Surgeon General's
10 report?

11 A. Yes.
12 Q. Cover to cover, so to speak?
13 A. I've read the majority of it. I don't know if
14 I've read every single word cover to cover.
15 Q. Okay. Did you select out certain parts that you
16 might have particular interest in?
17 A. Well I did read certain areas that I either had
18 not read in other documents --
19 There's a lot of -- lot of material in these
20 reports that's somewhat repetitive. So I -- I mean
21 anything that I was already aware of I may have
22 skipped over it, and focused on the things that was
23 new and unique to this particular report.
24 Q. All right. Now when you read it, did you read
25 its primary conclusions?

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1 A. Yes.
2 Q. Okay. Can you go to the page which bears the
3 Roman numeral v one, vi if you will, Roman numeral
4 vi.
5 A. Yes.
6 Q. Do you have that?
7 A. Yes.
8 Q. Okay. And those are the basic findings;
9 correct?
10 A. Yes.
11 Q. And did you read this in 1985 when you started
12 with RJR?
13 A. I may have. I read a number of Surgeon
14 General's reports. I don't remember if I
15 specifically read this one. But I have read it.
16 Q. Would your responsibilities at RJR have required
17 you to read the report once it came out?
18 A. Not initially, but eventually, yes.
19 Q. Okay. Certainly in 1981 you weren't in the
20 business; correct, sir?
21 A. No.
22 Q. All right. So if you read this, it would have
23 been sometime after you started at RJR.
24 A. Yes.
25 Q. Now the first basic finding is that there is no

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1 safe cigarette and no safe level of consumption;
2 correct?
3 A. Yes.
4 Q. Has Brown & Williamson ever stated to the public
5 that there is no safe cigarette and no safe level of
6 consumption?
7 A. Well I don't --
8 We have never made health claims about our
9 cigarettes, and I think my answer would be the same
10 as what it was before: Before making that statement,
11 we would determine whether or not there would be any
12 value to the consumer, and if the purpose is to
13 provide potential health effects information to guide
14 their choice to smoke, I think that that information
15 is out there.

16 Q. Is your answer no?
17 A. Could you repeat the question?
18 Q. Sure.
19 Has Brown & Williamson ever told the consuming
20 public that there is no safe cigarette and no safe
21 level of consumption?
22 A. I'm not aware of any instance where we've taken
23 out a full-page ad in a newspaper and said that.
24 Q. You haven't even taken out a one-line ad in a
25 newspaper that said that; have you?

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12161

1 A. Not that I'm aware of.
2 Q. You haven't said that anyplace; have you?
3 A. Not that I'm aware of.
4 Q. Now, if we could go down to conclusion number
5 seven, it says, "A final question is unresolved,
6 whether the new cigarettes being produced today
7 introduce new risks through their design, filtering
8 mechanisms, tobacco ingredients, or additives. The
9 chief concern is additives. The Public Health
10 Service has been unable to assess the relative risks
11 of cigarette additives because information was not
12 available from manufacturers as to what these
13 additives are." Do you see that?
14 A. Yes, I do.
15 Q. And when you read this the first time, were you
16 aware that that was the history with respect to
17 additives and whether they were known by public
18 health authorities?
19 A. Well I mean the fact that the tobacco industry
20 uses additives has been known from the time of the
21 first Surgeon General's report back in 1964 because
22 they talked about it, and it's been talked about in
23 other reports and it's been a topic in the published
24 literature, that additives are used and what their
25 nature is. However, I don't believe that specific

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1 recipes for brands were known.
2 Q. Yeah. No manufacturer had told anybody what
3 specific additives and what amount, et cetera, were
4 used in their cigarettes; had they?
5 A. No. That's typically not what consumer product
6 companies do.
7 Q. Now if you go on to page five of the Surgeon
8 General's report, sir, and I'd like to direct your
9 attention to the bottom, starting with "The
10 technology...." Do you see that?
11 A. Yes.
12 Q. Okay. "The technology for producing lower tar
13 cigarettes has progressed well beyond a simple
14 reduction in the amount of tobacco in the cigarette
15 or the removal of a portion of the tar by filtration.
16 Present technology has achieved tar reduction by
17 alterations in plant genetics, changes in the
18 cultivation and processing of the tobacco leaf, and
19 changes in cigarette paper and filtration of the
20 cigarette.

21 "The methods used in testing cigarettes by
22 machine may not correspond to the way persons
23 actually smoke. There is evidence to suggest that
24 cigarette yields measured by machine are very
25 different from the yields that the consumer actually

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1 obtains by smoking the cigarette, due in part to the
2 difference in patterns of smoking between testing
3 machines and individual smokers. Therefore, tar
4 measurements of current cigarettes may not reflect
5 the same risks -- same estimate of risk provided by
6 the tar measurement of cigarettes manufactured at the
7 time of the 1996 Public Health Service Review.

8 "Another closely related concern about lower tar
9 and nicotine cigarettes is the use of flavorings and
10 other chemical additives. In order to enhance
11 consumer acceptability, flavoring substances are
12 added to cigarettes; it may be that the lower the tar
13 yield, the more flavoring additives are used. It is
14 impossible to make an assessment of the risks of
15 these additives, as cigarette manufacturers are not
16 required to reveal what additives they use. No
17 agency of the federal government currently exercises
18 oversight or regulatory authority in the manufacture
19 of cigarette products. Further, no agency is
20 empowered to require public or confidential
21 disclosure of the additives actually in use by the
22 cigarette manufacturers."

23 Now, when you started with RJR, you became aware
24 of that history with regard to additives; did you
25 not?

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1 A. Yes.

2 Q. And when you started at Brown & Williamson, you
3 were aware of that history; correct?

4 A. Yes.

5 Q. And you were aware that in 1984 a law was passed
6 by Congress which required certain types of
7 disclosures of additives by the following year;
8 correct?

9 A. Yes.

10 Q. So in October of 1985, additives of the industry
11 being used were required to be disclosed to the
12 government; correct?

13 A. That sounds -- well I --

14 I'm not sure if it was October or if it was the
15 end of December, but they were required to be
16 disclosed in '85.

17 Q. And the way they are disclosed is through a law
18 firm in Washington, D.C.; correct?

19 A. Well that wasn't the way they were required to
20 be disclosed, but that was a method that the industry
21 chose to employ.

22 Q. And they sent the additives to this law firm,
23 which is Covington & Burling?

24 A. Yes.

25 Q. And then the information is sent on to the

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- 1 government; is that correct?
2 A. Yes. Well the information is compiled first,
3 and then sent on to the government in a compiled
4 form.
5 Q. Now when it's compiled, is it compiled and
6 disseminated to the government by cigarette brand?
7 A. No.
8 Q. So the government still wouldn't know which
9 additives are in which brand; correct?
10 A. Well they would know what additives are used in
11 cigarettes, but it wouldn't be by brand. So they
12 would certainly be aware of every additive that's
13 used in cigarettes sold in the United States.
14 Q. Now in reviewing the documents at Brown &
15 Williamson, you did learn, did you not, that freon
16 had been used in its cigarettes?
17 A. I believe it was used for a short period of
18 time.
19 Q. And can you direct your attention to Exhibit
20 26219.
21 A. Which volume?
22 Q. 26219.
23 A. That would be volume two or one?
24 Q. That would be volume two, sir, about a third of
25 the way from the back. Do you have it?

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- 1 A. Yes.
2 Q. Okay. I apologize for the quality of the copy,
3 but that's the best we could get.
4 A. Okay.
5 Q. Do you see that that's a memorandum dated June
6 2nd, 1977 from Ernest Pepples to Mr. Hughes?
7 A. Yes.
8 Q. And he was the CEO of Brown & Williamson at that
9 time?
10 A. I believe so.
11 MR. CIRESI: Your Honor, we'll offer
12 Exhibit 26219.
13 MR. BERNICK: Same objections as previously
14 on the record, Your Honor, on Rule 403 and the like.
15 THE COURT: Court will receive 26219.
16 BY MR. CIRESI:
17 Q. Now do you see that the first sentence refers to
18 alternatives by which Brown & Williamson could use
19 the G-13 process?
20 A. Yes.
21 Q. And the G-13 process was the freon additive that
22 was used in reconstituted tobacco?
23 A. It was used as the -- the -- the gas used to
24 expand tobacco --
25 Q. Okay.

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- 1 A. -- in the -- not reconstituted process, but in

2 the expansion process.
3 Q. In the expanded tobacco; correct?
4 A. Yes.
5 Q. All right. Now do you know how long Brown &
6 Williamson used it?
7 A. No, I don't recall that. I know it's for a
8 short period of time, but I don't recall exactly how
9 long.
10 Q. You know that Brown & Williamson did not test
11 the freon in any way before it placed it into its
12 expanded tobacco and into the stream of commerce;
13 don't you?
14 A. Well I know that R. J. Reynolds did extensive
15 testing and so did the National Cancer Institute, and
16 that that information was available to us.
17 Q. Well you know, though, that Brown & Williamson
18 didn't do any testing. That was my question.
19 A. Well I don't believe there was a need to do any
20 testing. It had already been done.
21 Q. All right. Now do you see in this document at
22 the second paragraph, Mr. Pepples is reporting to Mr.
23 Hughes, "We are advised that cigarettes contain 5
24 parts per million freon at the time of manufacture.
25 There has been no specific analysis for phosgene by

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1 Reynolds in its product testing and no long-term
2 study conducted to determine the effects, if any,
3 resulting from the inhalation of minute amounts of
4 freon and phosgene over extended periods of time."
5 Do you see that?
6 A. Yes.
7 Q. So at least Mr. Pepples was reporting to Mr.
8 Hughes in 1977 that there had been no studies with
9 regard to that subject matter; correct?
10 A. Yes. He -- he may not have been aware of what
11 information was out there.
12 Q. May not have been aware.
13 Now when Brown & Williamson put cigarettes into
14 the marketplace, do they say only smoke X number per
15 day?
16 A. No.
17 Q. Do they say only smoke for a week or two weeks?
18 A. No.
19 Q. Do they put any time limit on the use of
20 cigarettes?
21 A. No.
22 Q. Do you know what the environment of use of a
23 product is?
24 A. What the what?
25 Q. Environment of use of a product is.

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1 A. I don't know what you mean, what you're
2 referring to.
3 Q. All right. I'd like you to assume that the
4 environment of use is how you expect your product to
5 be used in its intended way by people who are using
6 the product.

7 A. Okay.
8 Q. Okay? You understand that; don't you?
9 A. Well I understand your current definition.
10 That's not what I --
11 I didn't know what you meant, frankly, when you
12 were saying that.
13 Q. All right. Do you know if design engineers take
14 into account the environment of use in designing
15 products?
16 A. Well now that you have defined the concept, I
17 would certainly expect that they would.
18 Q. Okay. And cigarette manufacturers expect that
19 they'll have smokers who will smoke for 20, 30, 40
20 years; correct?
21 A. I think that they're aware that people do that;
22 when people smoke, they may smoke for 20 or 30 years.
23 Q. And that's in the environment of use; correct?
24 A. As you defined it, yes.
25 Q. And that they could smoke any number of

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1 cigarettes per day; correct?
2 A. Well within practical limits. I mean I think
3 there's information about how much -- what the range
4 is of cigarettes that people may smoke, including the
5 extremes. But within those limits, I think that
6 they're aware of how much people may smoke.
7 Q. Some people smoke a pack a day; correct?
8 A. Yes.
9 Q. Some people smoke two or three packs a day;
10 correct?
11 A. Yes.
12 Q. And then there's people that are called chippers
13 in the industry; correct?
14 A. I've heard that term.
15 Q. And that's people who may take a cigarette now
16 and then.
17 A. Right.
18 Q. Puff a cigarette. Is that right?
19 A. Yes. Well that's my understanding of the term.
20 Q. And that's a term that's used in the industry,
21 "chippers;" correct?
22 A. Well we don't use it that much. I've only seen
23 it in published documents that talk about people who
24 only smoke one or two cigarettes a day or something
25 like that. It's not a term that we use, I mean

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1 not -- not that I use or anybody I know uses.
2 Q. Well you've heard that used at --
3 A. Yes, I have heard that term.
4 Q. Okay. And you've heard it at RJR and at Brown &
5 Williamson; have you not?
6 A. Well I -- I never heard it at RJR, and I only
7 heard it at Brown & Williamson in relation to
8 documents, outside external literature that discussed
9 the phenomenon of people who smoke only a couple of
10 cigarettes a day.
11 Q. Now what Mr. Pepples is talking about here is

12 the long-term effect of someone who would smoke
13 cigarettes with freon in them over a long period of
14 time; correct?
15 A. He is discussing long-term --
16 It's really hard for me to read that.
17 Q. Well he's talking about no long-term study. Do
18 you see that?
19 A. Could you please point it out to me?
20 Q. Sure. It's in the second paragraph.
21 A. "It is our understanding...?"
22 Q. "There has been no specific analysis for
23 phosgene by Reynolds in its product testing and no
24 long-term study conducted to determine the effects,
25 if any, resulting from the inhalation." Do you see
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1 that?
2 A. Yes.
3 Q. Okay. So he's talking about long-term use;
4 correct?
5 A. Right.
6 Q. All right. Now then he goes on to say -- if you
7 go down a little bit, do you see where it says "My
8 view continues to be...?"
9 A. Yes.
10 Q. Okay. "My view continues to be that the risk of
11 adverse consequences to Brown & Williamson arising
12 from the use of G-13 processed tobacco in its
13 cigarettes far outweighs the suggested economic
14 benefits." Do you see that?
15 A. Yes.
16 Q. Now the economic benefits was that when you use
17 expanded tobacco, you need less tobacco per cigarette
18 rod; correct?
19 A. Yes, it can be used that way.
20 Q. You can make the cigarette cheaper; correct?
21 A. Yes.
22 Q. So that's the economic benefit that we're
23 talking about; correct?
24 A. Yes.
25 Q. And then he says about the risks, if we go
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1 down -- or the adverse consequences, he lists number
2 one; doesn't he?
3 A. Yes.
4 Q. "As we have previously discussed there are three
5 problem areas in the use of the G-13 process:"
6 Number one, "The safety of the smoker
7 particularly in light of the phosgene theory."
8 Correct?
9 A. Yes.
10 Q. Now when you were at RJR, do you know how long
11 freon was used in their expanded tobacco?
12 A. No, I don't know the time course of their use of
13 it.
14 Q. Decades?
15 A. I don't know.
16 Q. Do you know of any study conducted by RJR or

17 Brown & Williamson as to the long-term effects of
18 someone smoking cigarettes that have had freon
19 injected into them?
20 A. Yes. R. J. Reynolds did extensive studies.
21 They relied on inhalation studies of tobacco which
22 had been expanded with freon, they did skin-painting
23 studies, and they did a number of chemistry studies
24 to test whether or not this phosgene theory in fact
25 seemed to be operational.

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1 Q. Sir, I'm asking long-term study conducted --
2 A. Well some of those studies were long term.
3 Q. How long?
4 A. The skin-painting, my recollection -- and it's
5 been a while since, you know, I've had access to this
6 information -- was a two-year chronic study, which is
7 the lifetime of a rodent, which is what these studies
8 are done in. Also the National Cancer Institute
9 tested tobacco expanded by this process in their
10 program, this is the program that we talked about
11 earlier, and they also employed the two-year mouse
12 skin-painting protocol.
13 Q. Two-year.
14 A. And they found it no different from tobacco that
15 was not expanded with freon.
16 Q. Are you aware of any test conducted over a
17 two-year period using humans with freon?
18 A. Well freon has been -- there's a --
19 There's a long history of use of freon
20 industrially.
21 Q. Sir, I'm asking about cigarettes.
22 A. Generally it's non-toxic.
23 Q. I'm asking about cigarettes. Okay? Have you --
24 Are you aware of any long-term study regarding
25 freon cigarettes with human beings? Are you aware of

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1 one?
2 A. Cigarettes aren't typically tested in humans,
3 especially toxicity tests.
4 Q. It would be unethical to do that; wouldn't it?
5 A. Well it depends on what you're referring to. I
6 mean lots of studies have been done with cigarettes
7 in humans looking at things like nicotine absorption
8 or carbon monoxide absorption, but I'm not sure what
9 you're proposing. If you give me some sense of what
10 you're talking about, I could give you an opinion on
11 whether I would regard that as ethical or not.
12 Q. It would be medically unethical to do a study
13 and take a non-smoker, have them smoke freon-laced
14 cigarettes over a long period of time, to see what
15 type of disease they may contract.
16 A. I don't know if that would be medically
17 unethical or not. I don't -- I don't believe that
18 cigarette tobacco expan --
19 I don't think that freon expansion alters the
20 basic properties of tobacco, and -- and a lot of
21 toxicological testing confirms that. Now studies

22 have not been done specifically on freon expanded
23 tobacco in humans, but a lot of studies have been
24 done on freon in humans, and it's -- it's non-toxic.
25 Q. Not in inhaling freon --

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1 A. Well --
2 Q. -- into the alveoli of lungs --
3 A. Well actually there has been --
4 Q. -- for years -- excuse me, sir.
5 -- for a period of 10 or 20 years. No such
6 study has been conducted.
7 A. There's been a long history of industrial use of
8 freon --
9 Q. Sir --
10 A. -- and occupational exposure to it, and there's
11 a lot of industrial hygiene literature concerning
12 that.
13 Q. That wasn't my question. My question was an
14 inhalation study over 20 years with a freon
15 cigarette.

MR. BERNICK: Your Honor --

17 Q. Has that type of study been done?

18 MR. BERNICK: Your Honor, I think he just
19 answered that. I don't know that Mr. Ciresi
20 appreciates what an industrial hygiene study is.

21 THE COURT: I don't think he's answered the
22 question that Mr. Ciresi asked.

23 You may answer that question.

24 A. Well generally consumer products aren't tested
25 for toxicological effects in humans, any consumer

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1 product, whether it be food or cosmetics or
2 beverages. That's just not done. And what you do is
3 you rely on animal toxicity tests and the -- and the
4 experience of industrial hygiene. But if you're
5 asking me has someone conducted a toxicological test,
6 a long-term inhalation study in humans the way it
7 would be conducted in animals, no.

8 Q. Thank you.

9 A. I'm -- I'm not aware of any such study.

10 Q. It would be medically unethical to conduct such
11 a study; correct?

12 A. Well it depends on what kind of study you're
13 referring to. If you showed me a protocol or
14 described the protocol --

15 Studies are done in humans with cigarettes all
16 the time, and I -- those pass medical review boards'
17 scrutiny. If you give me some sense of what you're
18 talking about, I can give you an opinion.

19 Q. Point to me one study that's been conducted
20 where the protocol and methodology is set up whereby
21 you took a non-smoker and said we're going to have
22 you smoke these cigarettes over a long longitudinal
23 study and we're going to compare you with non-smokers
24 to see whether or not you develop lung cancer.

25 A. I'm not aware of any study like that.

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- 1 Q. A study like that that said we're going to see
2 if you develop chronic obstructive pulmonary disease.
3 A. I'm not aware of any study like that with any
4 product, cigarettes or non-cigarettes.
5 Q. It would be medically unethical to take a human
6 being and tell them you're going to subject them to
7 cigarette smoke over that period of time to see
8 whether or not they will develop disease as
9 contrasted with people who don't smoke; wouldn't it,
10 sir?
11 A. I would think, if you intended to test any
12 product and test the toxicity over a long period of
13 time, that would not pass anybody -- anybody's
14 medical review board.
15 Q. Now Mr. Pepples in 1977, on page three of this
16 exhibit --
17 Do you have page three, sir?
18 A. I'm following it on the screen here.
19 Q. Okay. "Returning to the phosgene theory, we
20 have no way of knowing whether it has any scientific
21 merit at all. The Reynolds feasibility study which
22 was presented to us does not even mention the
23 phosgene theory. And while it does not say that
24 Reynolds looked -- And while it does say that
25 Reynolds looked for contaminants in the smoke and

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- 1 found none that were material, we see no evidence
2 that they specifically looked for phosgene." Do you
3 see that?
4 A. Yes.
5 Q. "Dr. Ahmed, the staff scientist for NRDC, makes
6 the flat statement that F-11 does decompose to
7 phosgene at temperature ranges easily achieved in the
8 combustion of tobacco products." Do you see that?
9 A. Yes.
10 Q. And phosgene is a gas that kills; correct?
11 A. Well it's toxic. It depends on what dose one
12 receives. It could. It can kill if one gets a
13 high-enough exposure.
14 Q. Well it was used in World War I as a weapon;
15 wasn't it?
16 A. I believe it has been used.
17 Q. Now have you reviewed any documents of RJR to
18 see what their quality control was with respect to
19 the parts per million that actually got into the
20 commercial cigarettes?
21 A. You mean pertaining to the analytical method
22 used to measure freon?
23 Q. No. I'm talking about test results which would
24 show how much they actually got, parts per million
25 into the cigarettes. Have you seen any such studies?

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- 1 A. I've seen --
2 Yes, I've seen test results of what potential

3 residues are of freon in cigarettes following the
4 tobacco expansion process.
5 Q. And when did you look at those documents?
6 A. When I was at RJR.
7 Q. And so they were RJR's documents.
8 A. Yes.
9 Q. Have you seen any BATCo or Brown & Williamson
10 documents regarding that subject?
11 A. Well no, not --
12 With the exception of this document, no.
13 Q. So you've never seen any that would show whether
14 or not the part-per-million levels were far in
15 advance of what was shown in the Reynolds documents.
16 A. No, I haven't.
17 Q. Can you direct your attention, please, to
18 Exhibit 21 -- I'm sorry, 26199.
19 Did you get an opportunity with regard to the
20 freon and phosgene to read Mr. Townsend's testimony?
21 A. No.
22 Q. You didn't see any documents that were discussed
23 with him?
24 A. No.
25 Q. If you could turn to 26199. This is a memo
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1 regarding additives dated September 25th, 1981, from
2 Mr. Wells to Mr. Pepples.
3 A. Yes, I see that.
4 Q. Brown & Williamson document; correct?
5 A. Yes.
6 MR. CIRESI: Your Honor, we'd offer 26199.
7 MR. BERNICK: Objection under Rule 403 and
8 for the other matters set forth in previous briefs
9 before the court.
10 THE COURT: Court will receive 26199.
11 BY MR. CIRESI:
12 Q. Again, you see that this is from Mr. Wells to
13 Mr. Pepples with a carbon copy to Mr. Sachs; correct?
14 A. Yes.
15 Q. It's dated September 25th, 1981.
16 A. Yes.
17 Q. And this would be after the Surgeon General
18 issued the report in 1981 regarding the additives and
19 the need to test them; correct?
20 A. Yes.
21 Q. And on the left-hand side you will see the
22 legend that it's privileged and confidential, and
23 produced as required by the court's March 7th, 1998
24 order; correct?
25 A. Yes, that's correct.
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1 Q. Now have you heard of the Committee of Counsel?
2 A. Yes, I have.
3 Q. That's a committee set up by the industry where
4 the lawyers from the industry get together?
5 A. That's my understanding.
6 Q. Do you have any other understanding of that?
7 A. No. That's essentially my understanding. It's

8 a committee that's attended by representatives from
9 each company, lawyers from each company.
10 Q. Do you know if those lawyers at those meetings
11 set scientific protocols?
12 A. No, I don't. I've never attended a Committee of
13 Counsel meeting.
14 Q. Committee of Counsel still exists; does it not?
15 A. I believe so.
16 Q. And you're aware that it's existed since the
17 1950s; are you not?
18 A. I don't know when it was first started.
19 Q. You'll recall that we saw the document from Mr.
20 Judge, who was the CEO of Lorillard, 1978 document,
21 regarding the Committee of Counsel?
22 A. Yes. Yes, I do.
23 Q. And it referred to Mr. Ramm, who was a former
24 general counsel of RJR?
25 A. Yes.

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1 Q. Referred to Mr. Hetsko, who was a general
2 counsel of American?
3 A. Yes.
4 Q. Talked about the abdication of research and
5 scientific materials to the Committee of Counsel?
6 A. I recall the content of the document.
7 Q. Now this refers to a Committee of Counsel
8 meeting on September 23rd; correct?
9 A. Yes.
10 Q. And it's talking about some positions regarding
11 additives; correct?
12 A. Yes.
13 Q. And there's an RJR position; correct?
14 A. Yes.
15 Q. And RJR's position was that "Continue meetings
16 with HHS at the industry's initiation and two or
17 three meetings from now submit to HHS a list of
18 commonly used casings and flavorings which would
19 include about thirty items." Do you see that?
20 A. Yes.
21 Q. Now HHS is Health and Human Services?
22 A. Yes.
23 Q. And this is about four years before the industry
24 was required by legislation to turn over information
25 regarding additives; correct?

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1 A. Yes.
2 Q. And as of 1981, are you aware of how many
3 additives were used in casings and flavorings by RJR?
4 A. No.
5 Q. Well in excess of 30; wasn't it, sir?
6 A. I assume it was.
7 Q. In the hundreds; fair?
8 A. Well there's -- depends on what you categorize,
9 but many --
10 There are many flavoring ingredients, but
11 they're talking about casings --
12 Q. And flavorings.

13 A. -- and flavorings.
14 Q. In the hundreds; correct, sir?
15 A. I don't know the exact number at that -- at that
16 time.
17 Q. Okay. Philip Morris said "Submit a list of
18 about fifty items soon." Correct?
19 A. Yes.
20 Q. You wouldn't know how many flavorings and -- how
21 many additives they use in their flavorings and
22 casings; would you?
23 A. No.
24 Q. Lorillard position, "Stall any disclosure by
25 industry as long as possible; industry should
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1 immediately appoint an independent panel of reputable
2 toxicologists to review a list of as yet undetermined
3 items." Do you see that?
4 A. Yes.
5 Q. And Liggett & Myers, "Stall disclosure and
6 industry should immediately appoint one independent
7 toxicologist to review a list." Correct?
8 A. Yes, that's what the document says.
9 Q. Now it also reflects the fact that at this
10 Committee of Counsel meeting Mr. Kornegay was in
11 attendance; correct?
12 A. Yes.
13 Q. And you know Mr. Kornegay was the head of The
14 Tobacco Institute; do you not?
15 A. No.
16 Q. Do you know if he was with The Tobacco Institute
17 and was its president at any time?
18 A. I've never --
19 This is the first time I've heard the name.
20 Q. All right. "Horace Kornegay's assessment of the
21 legislative situation is that the current criticism
22 of the industry on the hill in the additives area is
23 based on the industry's failure to disclose. He
24 cannot predict whether the industry could sell an
25 independent review panel. It is possible." Do you
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1 see that?
2 A. Yes.
3 Q. He's talking about selling an independent review
4 panel to Congress; correct?
5 A. I -- I don't know who he's talking about selling
6 it to.
7 Q. Well from the --
8 Well he's talking about the industry selling it;
9 isn't he?
10 A. I don't know. Maybe it's talking -- you said
11 who --
12 Who did you say he was with?
13 Q. He's with The Tobacco Institute. I'll represent
14 that to you, sir. Can you accept that?
15 A. Yes.
16 Q. But apart from who he was with, it says here
17 whether the industry could sell an independent review

18 panel; correct?
19 A. Yes.
20 Q. And selling it is selling it to Congress; isn't
21 that correct?
22 A. I don't know. Maybe he meant HHS. I -- I don't
23 think I can tell from this document what he's
24 referring to.
25 Q. Okay. So it's either HHS or some governmental
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1 agency; correct?
2 A. No. What I'm saying is I can't tell. It could
3 have been somebody other than Congress that you're
4 suggesting. I don't know who he was talking about.
5 Q. Okay.
6 A. Maybe he's talking about internally. I don't
7 know.
8 Q. If you go on to the next page --
9 Well the industry wouldn't sell it to itself
10 internally; would it?
11 A. Well maybe they were having discussions about
12 positions and there's disagreement about what to do.
13 I don't know.
14 Q. Well I guess that's fair enough, because it
15 appears here that there is some disagreement. Some
16 wanted to stall and some wanted to put in 30 and
17 others want to put in 50; correct?
18 A. Well this --
19 Looks like to me this is a think piece and
20 people are weighing pros and cons of different
21 approaches without us having taken any action yet,
22 and they're -- by its very nature, they're
23 discussing --
24 You know, we could -- we could go down any
25 number of paths. Let's weigh the pluses and minuses
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1 of all those pathways. And that's what they seem to
2 be doing, discussing this on paper.
3 Q. Have you read this document before?
4 A. Yes, I have.
5 Q. When's the first time you read it?
6 A. I don't know the first time I read it, but I
7 have read it.
8 Q. Within the last few days?
9 A. I think I have read it in the last few days, but
10 I -- and I read it prior to that as well.
11 Q. You read --
12 A. I read this at a previous trial.
13 Q. Oh, you read this previously in a trial.
14 A. Yes.
15 Q. So you've seen this document before this case.
16 A. Yes.
17 Q. All right. If you go on to the next page, then,
18 "Disclosure and Industry Toxicologists - Pro and
19 Con." Do you see that?
20 A. Yes.
21 Q. "The following reasons support disclosure:
22 "There are no toxicological problems with the

23 industry's additives - the judgment about most
24 additives is 'uncertain.'" Do you see that?
25 A. Yes.

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1 Q. Now you're aware, are you not, that there had
2 been no testing on additives up to 1981 by the
3 industry under pyrolysis conditions?
4 A. That's not true.
5 Q. You think there had been?
6 A. I know there had been.
7 Q. Okay. Where had they been?
8 A. Where -- you want -- want me --
9 Q. Where?
10 A. -- to give you examples?
11 Q. What company?
12 A. Well all the companies, including BATCo. I'm
13 most familiar with BATCo's research. But BATCo had
14 done a lot of work. A lot of the work that was
15 described in the American Tobacco research, that --
16 that program at the Medical College of Virginia,
17 they --
18 Q. We're going to get to that.
19 A. -- specifically undertook testing on
20 ingredients.
21 Q. Okay.
22 A. National Cancer Institute tested ingredients
23 which were under pyrolysis conditions. There was a
24 lot of work that had been done as you described prior
25 to this time.

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1 Q. Is that why the judgment about most additives is
2 uncertain?
3 A. I'm not sure what Mr. Wells means there by that.
4 All I know is what I know. Part of this --
5 Part of the JAMA studies included, in fact, a
6 comparison of cigarettes that were all flue-cured and
7 no additives against an American cigarette with its
8 full complement of additives, and the study showed in
9 fact that for that cigarette that had the additives,
10 the skin -- the reaction to skin-painting test was
11 actually less, the cigarette with additives.
12 Q. Okay. My question --
13 A. And that was under pyrolysis conditions.
14 Q. Fine. And my question is is that why the
15 judgment about -- about most additives is uncertain?
16 That was my question.
17 A. I don't know what Mr. Wells means by that.
18 Q. If we go on, then, number two, "If the industry
19 discloses now, the problem will go away."
20 And three, "Disclosure now will appease critics
21 in Congress who are attacking the industry on the
22 basis of its refusal to disclose." Correct?
23 A. That's what the document says, yes.
24 Q. All right. And then it sets forth reasons for
25 opposing disclosure; correct?

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- 1 A. Yes.
2 Q. Number one, "There is long term pressure to use
3 the additives issue to attack the industry in public
4 and support adverse legislation, such as the 'little
5 FDA' proposed by the Surgeon General in 1979.
6 Disclosure would give anti-industry activists a focal
7 point for the next phase of the attack, which might
8 begin with the renewal of the HHS request for
9 disclosure of the material which the companies have
10 on hand pertaining to health consequences of each
11 additive or review of the list by scientists who are
12 unfriendly to the industry." Do you see that?
13 A. Yes.
14 Q. Now do you know what Mr. Wells had in mind with
15 regard to the material which the companies have on
16 hand pertaining to health consequences?
17 A. No. It may be what I just mentioned.
18 Q. Do you know if they were going to destroy any
19 information they had on hand with regard to adverse
20 health consequences?
21 A. I don't know what they were thinking, but I know
22 that BATCo didn't destroy any information. I've seen
23 the information.
24 Q. You weren't at BATCo in 1981; were you, sir?
25 A. No, but I've seen the reports since then.

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- 1 Q. You have --
2 You were not at BATCo in 1981; were you?
3 A. No, I was not.
4 Q. Number two, "Although the balanced, rational
5 judgment of the industry is that there are no
6 problems with its additives, anti-industry activists
7 would soon create a body of scientific opinion that
8 many of the additives posed grave problems." Do you
9 see that?
10 A. Yes, that's what the document says.
11 Q. And do you know what the basis of that statement
12 was?
13 A. I assume he's worried about litigation, but I
14 don't know.
15 Q. So you have no idea whether or not there was
16 scientific information in the company's files which
17 show that there was harmful effects on the -- with
18 the additives.
19 A. No.
20 Q. If we go on to the next page -- actually we have
21 to start at the bottom, I'm sorry, sir, of page two.
22 "The following reasons support the appointment of an
23 independent panel of scientists." Do you see that?
24 A. Yes.
25 Q. Number one, "Avoid adverse legislation by

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- 1 allowing HHS to announce in its -- it is meeting its
2 requirements through industry self-policing."
3 Correct?

4 A. Yes.
5 Q. So in other words, the industry was going to
6 self-police itself; correct?
7 A. Well that was --
8 I mean this is a whole list of proposals, but
9 that was among the things on the list.
10 Q. Okay. And this independent panel then would
11 "Avoid mandatory disclosure of all additives."
12 Correct?
13 A. That's what the document says.
14 Q. And number three, it would "Improve the public
15 image of cigarettes through HHS endorsement of
16 industry self-policing. Gain control of how
17 additives issue will be handled even if self-policing
18 is not sanctioned." Correct?
19 A. That's what the document says, yes.
20 Q. And then there's a reason -- two reasons cited
21 to oppose an industry panel of toxicologists;
22 correct?
23 A. Yes, that's what it says.
24 Q. "Products liability litigation risk is increased
25 because of the possibility that the industry

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1 appointed panel might conclude that certain additives
2 have problems." Correct?
3 A. That's what it says.
4 Q. And number two, "Unnecessary because the problem
5 will go away if the industry simply discloses some
6 number of its additives." Correct?
7 A. Yes, that's what it says.
8 Q. Okay. Then it goes on to state, "The product
9 liability litigation risk position stated by Bob
10 Northrip" --

11 Now do you know where he's from?

12 A. Shook, Hardy & Bacon.

13 Q. -- "is based on the opinion that it would be
14 more difficult to defend against adverse assessments
15 of additives by an industry panel than adverse
16 assessments by HHS scientists. The assessment is the
17 same even if the HHS scientists concluded that a
18 larger number of substances were dangerous. The
19 Northrip position is that a better alternative would
20 be company review and testing of additives. If a
21 company -- If company testing began to show adverse
22 results pertaining to a particular additive, the
23 company control would enable the company to terminate
24 the research, remove the additive, and destroy the
25 data."

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1 Is that what he says?

2 A. That's what the document says.

3 Q. "Hopefully, company testing would be done prior
4 to adoption of an additive, but if tests were made of
5 an additive in current use the additive would be
6 discontinued and eliminated from the C&B list before
7 HHS had opportunity to make adverse comment." Do you
8 see that?

9 A. Yes, I do that.
10 Q. And C&B is Covington & Burling, the law firm
11 that I asked you about just a little while ago; isn't
12 it?
13 A. I believe so.
14 Q. Then he goes on to state, "A few comments are in
15 order about the Northrip position. There is no way
16 to know that each company would have performed review
17 and testing of its additives before submitting them
18 to C&B. When Northrip gave his assessment of the
19 seriousness of the risk he described, he assumed that
20 the industry panel would be asked to give a judgment
21 in the form of 'safe' or 'unsafe.' Northrip also
22 assumed that a toxicologist who reviewed the industry
23 list of additives would probably find four or five
24 substances which were problems. This is not his own
25 conclusion; he made this assumption because it had

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1 been stated as a probability at the table." Correct?
2 A. That's what the document says.
3 Q. And the table they're talking about is the table
4 that these Committee of Counsel sat around and
5 discussed what they were going to do on September
6 23rd, 1981; correct, sir?
7 A. Well I don't know what table they're referring
8 to. But this document, as I said, strikes me as
9 where -- a situation where people are -- are throwing
10 up options and say let's look at these and examine
11 these. So by its very nature, the whole range of
12 possibilities, from pro to con, from A to Z, is being
13 examined. For each one they're weighing pluses and
14 minuses about what might be the pluses and minuses or
15 what -- what ought to be done. So it's hard for me
16 to say. I wasn't there. But what I do know is that
17 the industry disclosed all its ingredients to the
18 government and ultimately disclosed all of its
19 ingredients to the public.

20 Q. Sir --

21 A. The government has had the list for 10 years
22 now, and they can examine and give an opinion if they
23 think there's a problem. They haven't done that.

24 Q. Sir, the government doesn't know in what
25 combination additives are used in any particular

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1 brand of cigarette; does it?
2 A. But they know every single additive that's being
3 used. They could imagine any combination they wish.
4 If they have a problem, they're certainly in a
5 position to give an opinion on that.
6 Q. So you want the government to imagine any
7 possible combination or permutation of any potential
8 cigarette of any potential company and to do
9 long-term testing and then say, "We caught you," --
10 A. No, I --
11 Q. -- "you have a problem." Is that what you're
12 suggesting?
13 A. I'm saying if there's scientific evidence to

14 suggest that two ingredients might form some unique
15 issue or problem, and they look and see these two
16 ingredients are on a list, they certainly can tell us
17 about that, if any ingredient on the list poses a
18 problem for any reason. They've had that knowledge
19 for over 10 years now, but they've never come to us
20 and said we have a problem with this.

21 Q. Well --

22 A. But they've had that opportunity. In fact
23 that's been their mandate by Congress.

24 Q. Let me ask you this: Do you think it would be
25 okay for HHS or any government agency to sit down and

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1 have a committee of employees -- let's call them a
2 committee of employees -- and say well, okay, we've
3 got this range of possibilities. I think that is
4 what you talked about in this memo, you said range of
5 possibilities. We've got this range of
6 possibilities. Why don't we do this. Here's one
7 possibility. We'll test, and if any adverse results
8 come up -- we're actually controlling it, so we can
9 then just tell the company to remove the additive and
10 we'll destroy the data. Would that be a good thing
11 for the government to do?

12 A. I think the government sits down and ponders all
13 kinds of possibilities. What is important is not
14 what they thought about but what they actually ask.

15 Q. Excuse me.

16 A. What we actually did was give all the
17 information to the HHS, and we ultimately disclosed
18 it to the public.

19 Q. I asked you --

20 A. That's what happened, not what was contemplated.

21 Q. I asked you if that would be a good possibility
22 for the government to contemplate.

23 A. I would expect --

24 MR. BERNICK: I think this asks the witness

25 to opine as to government policy in this area, and I

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1 think it is argumentative.

2 THE COURT: No, you may answer the
3 question.

4 A. I would expect --

5 I would hope that the government would consider
6 every aspect of every decision that they made and
7 ultimately conclude to come to the right decision.

8 Q. So you --

9 A. Which is what I believe we did.

10 Q. So you would hope that the government would
11 consider as a possibility that they would test the
12 additive. If they found it adverse to the health
13 effects of smokers, to tell the company remove it, we
14 won't say anything, and we'll destroy the data. That
15 would be a good possibility just to contemplate; is
16 that right?

17 MR. BERNICK: Your Honor, again it's
18 argumentative and asks for the witness's views on

19 what the government should do.
20 THE COURT: No, you may answer it. It's a
21 hypothetical.
22 A. I gave you my answer.
23 THE COURT: You may answer the question.
24 A. Well could you please repeat the question?
25 Q. I certainly will.

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12200

1 So you would hope that the government would
2 consider as a possibility that they would test the
3 additive. If they found it adverse to the health
4 effects of smokers, to tell the company remove it, we
5 won't say anything, and we'll destroy the data. That
6 would be a good possibility just to contemplate; is
7 that right?
8 A. I -- I wouldn't recommend taking that sort of an
9 action. I can't -- I -- it's hard for me to give an
10 opinion about what's okay to contemplate or not. The
11 only thing I can think about is in terms of what
12 actually happened, what actions were actually taken.
13 That doesn't sound like something that I would
14 recommend.
15 Q. It would be unethical to even contemplate taking
16 such an action on a product that is reported to kill
17 over 400,000 people a year; wouldn't it, sir?
18 MR. BERNICK: Again, Your Honor, that's
19 argumentative.
20 THE COURT: Well it is a little
21 argumentative at this point.
22 BY MR. CIRESI:
23 Q. Sir, if the government shouldn't do it, you
24 would agree the companies shouldn't contemplate that;
25 wouldn't you?

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12201

1 MR. BERNICK: Same question. Again it's
2 argumentative.
3 THE COURT: No, you may answer that.
4 A. I can't -- I can't give an opinion on what the
5 companies should or should not contemplate.
6 Q. All right.
7 A. And I'd have to be an ethicist or a philosopher
8 to give an opinion on what's ethical to think about
9 or not think about. To me what's important is what
10 actually happened and what actually -- what actions
11 actually occurred. All kinds of things have been
12 thought about by all kinds of people, and this really
13 represents to me thinking out loud, only it's on
14 paper. And to me what's important is what actually
15 happened, which is what I know happened, which is we
16 did release the list, we released it to the public,
17 and a huge amount of testing and assessment has been
18 done on the acceptability of these ingredients.
19 Q. You would have to be an ethicist or philosopher
20 to say whether or not that contemplated action is
21 ethical; is that what you're saying?
22 A. Well what's the standards of -- of ethics? Tell
23 me what -- what the test is for something that's

24 ethical or not ethical.
25 Q. Well do you have an ethicist on staff at Brown &
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1 Williamson?
2 A. No.
3 Q. Do you have a philosopher on staff at Brown &
4 Williamson?
5 A. I don't know.
6 Q. So you sort of have to rely on the ethics of the
7 people who are doing the work; don't you, sir?
8 A. Look, all I'm saying is what --
9 I know what we did. I can't really speak to the
10 things that were being contemplated or discussed in
11 this document.
12 Q. Can you answer --
13 A. I wasn't there.
14 Q. Can you answer my question?
15 You have to rely on the ethics of the people
16 that are there; don't you?
17 A. Well I think we have to rely on the ethics of
18 the people who actually deal with these issues.
19 These people were discussing these issues, but these
20 aren't the people who actually dealt with the issue
21 and managed the issue.
22 Q. And you have to rely on the ethics of
23 management; don't you?
24 A. Yes. To some degree, yes.
25 Q. Management has to set the ethical standard that
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1 will be followed by the company; doesn't it?
2 A. Well I mean everybody is involved in -- in
3 ethics, but management certainly is managing the
4 company.
5 Q. And management should not abide by or tolerate
6 unethical conduct by its employees; should it?
7 A. If they're --
8 If employees are engaged in unethical conduct, I
9 would hope management would not tolerate that.
10 Q. And management itself should not engage in
11 unethical conduct; should it?
12 A. Unethical conduct as opposed to thought, yes,
13 absolutely. I don't think people should engage in
14 unethical activities.
15 Q. Now do you know what information they had at the
16 table?
17 A. No. I wasn't there.
18 Q. So you don't know what information they had to
19 state that it was a probability that four or five of
20 the substances were a problem; do you?
21 A. Well it says this is an assumption that was
22 stated as a probability at the table. I don't know
23 what information they had or what they based this
24 assumption upon.
25 Q. No, he said that Northrip made this assumption
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1 because it had been stated as a probability at the
2 table. That's what it says; isn't it, sir?

3 A. I have no idea what they're basing that on.

4 Q. If you'd go on to the next page, can you go to
5 the paragraph toward the bottom where it says "There
6 appears to be some confusion...?"

7 A. Yes, I see it.

8 Q. Well let's -- let's go up a little bit before
9 that. The paragraph right before that, do you see
10 where it says, "Is it feasible...?"

11 A. I don't see that.

12 Oh, I see it, yeah.

13 Q. All right. "Is it feasible to expect each of
14 the companies to do review and testing of its
15 additives and remove problematical additives from
16 usage and from the list? If so, then the risk of
17 adverse finding by industry toxicologists is
18 substantially reduced. If not, then the Northrip
19 scheme to prevent adversity subsequent to disclosure
20 is not available.

21 "There appears to be some confusion that the
22 recommendation of an independent industry panel of
23 toxicologists is primarily for the purpose of
24 developing information about our additives. Of
25 course, this is not the case. The industry panel is

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1 a formal mechanism for self-policing as part of an
2 industry strategy to gain HHS sanction." See that?

3 A. Yes. That's what the document says.

4 Q. So the industry together comes up with
5 strategies in concert with respect to
6 smoking-and-health issues; doesn't it?

7 A. Well this document seems to reflect discussions
8 of people weighing various options on a particular
9 matter; in this case, what to do with potential
10 legislation coming up concerning ingredient
11 disclosure.

12 Q. And sir, when you started with Brown &
13 Williamson and you had that orientation at Shook,
14 Hardy & Bacon almost immediately after you started,
15 you were told industry positions; weren't you?

16 A. Well I was told what cases had been tried and
17 what -- what -- the positions that were taken by both
18 the plaintiffs and the defense in those cases.

19 Q. You were told industry positions on
20 smoking-and-health issues such as addiction and
21 causation; weren't you?

22 A. I think I just answered your question.

23 Q. No, you didn't, sir.

24 You were told industry positions with respect to
25 addiction and causation; weren't you?

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1 A. I -- I was given a historical review of a number
2 of cases that had come up, litigation, the issues and
3 the theories that various plaintiffs were focusing
4 on. Because they all focus on different theories --

5 not all of them. But they're different, the kind of
6 issues that were raised and the lines of attack by
7 plaintiffs and the kind of defenses that were
8 being -- that were being used by the defense.
9 That --
10 Q. When we saw your notes with regard to addiction,
11 it said "Industry Position." Didn't talk about any
12 individual case; did it?
13 A. Well that's my recollection of the meeting. I
14 mean I --
15 The notes may not be an exact reflection of
16 everything we talked about. It was a shorthand. I
17 was jotting notes as I was being presented
18 information.
19 Q. The industry has stood in concert in its
20 positions with respect to causation and addiction;
21 hasn't it?
22 A. I don't know what you mean by "stood in concert"
23 really.
24 Q. Together.
25 A. Well I -- I don't believe that's the case. I

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1 think various views have been expressed.
2 Q. Ah, the very view that has been expressed is by
3 little Liggett, who gives warnings beyond what's
4 required; isn't that right, sir?
5 A. That's one.
6 Q. Yeah. And they say smoking is addictive; don't
7 they?
8 A. I think --
9 I believe they have put a warning on their pack
10 to that effect.
11 Q. Not prevented by the government; is it?
12 A. Apparently not. I don't know the legalities of
13 it though.
14 Q. Yeah. Do you remember earlier in your testimony
15 this morning you said, well, I may be wrong, but I
16 think you can only do what the government says? Do
17 you remember that?
18 A. That was my understanding.
19 Q. And Liggett says that cigarette smoking causes
20 disease; doesn't it?
21 A. I'm not familiar with the warnings that they
22 have compared to the warnings that are on anybody
23 else's packs.
24 Q. And those warnings have come into effect since
25 1994; haven't they, sir?

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12208

1 A. I believe so.
2 MR. CIRESI: Your Honor, that would be a
3 good place to break.
4 THE COURT: All right. We'll recess,
5 reconvene at 2:00 o'clock.
6 THE CLERK: Court stands in recess to
7 reconvene at 2:00 o'clock.
8 (Recess taken.)
9

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12209

1 AFTERNOON SESSION.
2 THE CLERK: All rise. Ramsey County
3 District Court is again in session.
4 (Jury enters the courtroom.)
5 THE CLERK: You may be seated.
6 THE COURT: Counsel.
7 MR. CIRESI: Thank you, Your Honor.
8 Good afternoon, ladies and gentlemen.
9 (Collective "Good afternoon.")
10 BY MR. CIRESI:
11 Q. Good afternoon, doctor.
12 A. Good afternoon.
13 Q. Sir, when we recessed this morning, we were
14 discussing Exhibit 26186, which was the memorandum
15 from Mr. Wells regarding -- excuse me, 26199, which
16 was the memorandum concerning the Committee of
17 Counsel. Do you recall that?
18 A. Yes.
19 Q. Now when you were --
20 A. That's at --
21 Q. -- at RJR, you did eliminate some additives
22 before the submission was presented to HHS; correct?
23 A. Well this was reviewed, and a decision was taken
24 that some ingredients would be removed from our
25 products.

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12210

1 Q. Prior to the first submission of the HHS list;
2 correct?
3 A. Yes.
4 Q. And do you remember how many there were?
5 A. No.
6 Q. Does the number 32 refresh your recollection?
7 A. Sounds in the ballpark.
8 Q. Okay. And then on a second submission you
9 removed another 33; correct?
10 A. That sounds like a --
11 Yeah, that sounds like it could be in the
12 ballpark, yes. I don't have a specific recollection.
13 Q. Why don't you take a look to your right, I
14 believe Exhibit 12867 is there. It's an ingredient

15 program status update dated 7-18-86.
16 A. Yes.
17 Q. Your name is on it; correct?
18 A. Yes.
19 MR. CIRESI: We'd offer Exhibit 12867, Your
20 Honor.
21 MR. BERNICK: No objection, Your Honor.
22 MR. CIRESI: Court will receive 12867.
23 BY MR. CIRESI:
24 Q. And if you turn to the fourth page, do you see
25 the current status?

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12211

1 A. Yes.
2 Q. Do you remember I asked you if there were
3 hundreds of ingredients?
4 A. Yes.
5 Q. Okay. And the number actually is 417; correct?
6 Total non-tobacco ingredients?
7 A. 417?
8 Q. Yes. Do you see that on the third page, current
9 status, total number of non-ingredient -- non-tobacco
10 ingredients currently used?
11 A. Yes.
12 Q. Okay. And then 32 were removed from all
13 products as of March 15th, 1986, prior to the first
14 submission of the HHS list; correct?
15 A. Yes.
16 Q. And then 33 additional ingredients had been
17 identified for removal prior to the second
18 submission; correct?
19 A. Yes.
20 Q. And you're aware, are you not, that Brown &
21 Williamson also removed a number of ingredients from
22 its list and its products prior to submission to the
23 HHS?
24 A. I wasn't with Brown & Williamson at that time,
25 so I don't know what they did at that time.

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1 Q. All right. And you have not gone back to
2 ascertain how many they removed; have you?
3 A. No.
4 Q. Now, sir, with regard to additives in filters
5 and cigarette papers, that's not provided to HHS; is
6 it?
7 A. Actually HHS has requested information about
8 that and we've provided that. It's not required by
9 law, but they've informally requested it and we've
10 given that information to them.
11 Q. When was that, sir?
12 A. A submission was made within the last year,
13 about -- within a year. I'm not sure exactly when.
14 Q. Prior to 1994 nothing had been provided to HHS
15 with regard to additives in filters or cigarette
16 paper; correct?
17 A. Well we've given them what they've asked us when
18 they asked for it.
19 Q. That wasn't my question. Did you --

20 Did you misunderstand my question?
21 A. No, I didn't.
22 Q. All right. Well let me repeat it.
23 Prior to 1994 nothing had been provided to HHS
24 with regard to additives in filters and cigarette
25 paper; correct?

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12213

1 A. Was that your question you mean?
2 Q. That was my question.
3 A. Yes. That was the question.
4 Q. And is the answer that's right?
5 A. To my knowledge, we didn't provide any
6 information about filters and paper ingredients.
7 Q. Thank you.
8 Now can you direct your attention to Exhibit
9 26186, which is another Wells memorandum which is
10 about three years after the Committee of Counsel
11 meeting.
12 A. Which volume is --
13 Q. 26186 would be in volume number two.
14 Do you have it, sir?
15 A. Yes, I do.
16 Q. Okay. And that's from Mr. Wells to Mr. Sachs
17 with a carbon copy to Mr. Pepples?
18 A. Yes, it is.
19 Q. Dated January 12th, 1984; correct?
20 A. Yes, it is.
21 MR. CIRESI: Your Honor, we would offer
22 Exhibit 26186.
23 MR. BERNICK: We have the objections
24 previously raised in briefing before the court, Your
25 Honor.

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12214

1 THE COURT: Court will receive 26186.
2 BY MR. CIRESI:
3 Q. Now again along the left-hand margin we see the
4 legend privileged and confidential, produced as
5 required by the court's March 7th, 1998 order;
6 correct?
7 A. Yes.
8 Q. All right. Have you seen this document before?
9 A. Yes, I have.
10 Q. When's the first time you saw it?
11 A. Within the last two days. It's among the set
12 that you sent over as indicated to be used in my
13 cross-examination. That's -- that's the time that I
14 looked at it, for that reason.
15 Q. So it was after you returned to Minnesota on
16 Monday; correct?
17 A. I believe so.
18 Q. Now in the first paragraph you'll see that Mr.
19 Wells is stating that "On January 10 we discussed
20 with Lance and Gil their intention to ask Southampton
21 to conduct experiments which would utilize tracers to
22 determine whether flavoring substances transfer to
23 smoke or pyrolyze." Do you see that?
24 A. Yes, I do.

25 Q. It says that "The literature does not contain
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1 reports of experiments of this type." Do you see
2 that?

3 A. Yes, I do.

4 Q. "Other work indicates that the experiments would
5 show that most and perhaps all of the substances
6 would transfer." Do you see that?

7 A. Yes.

8 Q. And in the second paragraph Mr. Wells is stating
9 that in his view "it probably is appropriate for B&W
10 to conduct the experiments described because of HHS'
11 interest in the pyrolysis of cigarette additives."
12 Correct?

13 A. Yes.

14 Q. Now this is about three years after that
15 Committee of Counsel meeting where they were trying
16 to figure out which type of approach to take with the
17 government; correct?

18 A. Yes.

19 Q. And if you go down to the next paragraph --
20 Well let's stay in that paragraph. Do you see
21 the next sentence says, "B&W could maintain the
22 position that the experiments and their results have
23 no proven health consequences to humans." Do you see
24 that?

25 A. Yes.

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1 Q. Then in the next paragraph he states, "We
2 questioned whether the experiments should be
3 conducted by Southampton but reached no agreement
4 with Lance and Gil."

5 Now Gil would be Gil Esterle; correct?

6 A. Yes, I assume so.

7 Q. And he was in R&D at that time; correct?

8 A. I believe so.

9 Q. And do you know who Lance is?

10 A. Yes.

11 Q. And who's that, sir?

12 A. Lance Reynolds I assume.

13 Q. And Lance Reynolds was what position?

14 A. In '84 I don't know. He was involved in product
15 development at some point, but I don't know, you
16 know, what his role or title was at this point.

17 Q. He was also in research and development; was he
18 not?

19 A. Yes. Yes.

20 Q. "In my view, the question merits further
21 consideration. The first step is to look at the
22 objective. The larger objective is to develop
23 evidence which can be useful to B&W in the public
24 debate in the U.S. on the question of cigarette
25 flavorings." Correct?

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12217

1 A. Yes.
2 Q. So that Mr. Wells at this point was seeking to
3 have B&W be able to have some evidence in its files
4 to support its contention that cigarette additives
5 did not pose any risk of harm to consumers; correct?
6 A. Well B&W already had information in its files.
7 I think he's seeking, maybe, perhaps more information
8 than we already had.
9 Q. And what he tells them is that when you do these
10 tests, just avoid any mention of health or biologic
11 consequences; doesn't he?
12 A. Where does it say that?
13 Q. Why don't you turn to the next page, last
14 sentence, last paragraph. "If R&D elects to perform
15 the experiments at Southampton, R&D should ask
16 Southampton to avoid any mention of health or
17 biologic consequences in the report or in any other
18 documentation pertaining to the experiments." Isn't
19 that what he says?
20 A. Again, this -- this reflects, I believe, his
21 concern about such statements potentially being used
22 against us. I -- I don't know exactly what he meant,
23 but I do know something about this. I know that
24 Southampton did in fact do that research, they did do
25 transfer rate studies on ingredients and in fact has
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12218

1 published that research.
2 Q. Excuse me, sir. Did you misunderstand my
3 question?
4 A. No, I didn't.
5 Q. You didn't.
6 A. No.
7 Q. Well let me -- let me restate it for you.
8 Q. Last sentence, last paragraph, "If R&D elects to
9 perform the experiments at Southampton, R&D should
10 ask Southampton to avoid any mention of health or
11 biologic consequences in the report or in any other
12 documentation pertaining to the experiments." Isn't
13 that what he says?
14 A. That's what the document says. You read that
15 correctly, sir.
16 Q. And that's Mr. Wells telling Mr. Sachs that;
17 correct?
18 A. Well this is a document that goes to -- from Mr.
19 Wells to Mr. Sachs.
20 Q. And who is Mr. Sachs?
21 A. I don't recall his title and role at this time.
22 Q. He was in research and development; wasn't he?
23 A. I have no reason to dispute that.
24 Q. Now when people communicate at Brown &
25 Williamson, they communicate in some instances by
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12219

1 memoranda; don't they?
2 A. Yes, obviously.
3 Q. And when they do communicate by memoranda, they
4 intend to be truthful in what they're saying to the
5 other person that they're sending the memoranda to;

6 correct?
7 A. I would hope so.
8 Q. They don't lie to them; do they?
9 A. I hope not.
10 Q. Okay. So in this case Mr. Wells was saying if
11 we elect to perform the experiments at Southampton,
12 R&D should ask Southampton to avoid any mention of
13 health or biologic consequences in the report or in
14 any other documentation pertaining to the
15 experiments. Correct?
16 A. Yes. I don't see that as -- as being -- as
17 asking someone to lie. It seems to me what he's
18 asking is report the chemistry and the analytical
19 findings, but don't attach any interpretation to it.
20 That would be an entirely different exercise, to
21 report data as opposed to provide interpretation.
22 But I'm only guessing at this point. I really
23 don't know what Mr. Wells said -- or meant, but I can
24 tell you this work was done and was published and
25 made available to the public.

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12220

1 Q. And we don't know how it was slanted or what the
2 underlying documentation was or anything else; do we,
3 sir?
4 A. Well the data is the data. It speaks for
5 itself. It was published in a peer-reviewed journal
6 and I would hope that the peer-review process would
7 have taken into account any over- or under-
8 interpretation of what the numbers of any of the
9 results generated.
10 Q. Did the referees --
11 Did the reviewers of the peer-reviewed
12 literature get all the underlying data and
13 information from B&W and the drafts to see if
14 something was slanted or not?
15 A. If they requested it, they would have received
16 it.
17 Q. They never get that type of information; do
18 they, sir?
19 A. Well I don't know. I think different reviewers
20 raise different issues and ask for different things.
21 That's part of what the process is about. It can
22 happen. Peer reviewers may ask for underlying data
23 before they'll pass on the paper, and I don't know if
24 they did that in this case or not.
25 Q. Right. You have no idea whether the referee or

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12221

1 the peer reviewers got any of the underlying
2 information; do you?
3 A. I don't know. I've got no basis one way or the
4 other to know about it.
5 Q. You have no idea how or if the information was
6 slanted; do you?
7 A. I never know that about any paper that I read in
8 the scientific literature.
9 Q. What we do know is that Mr. Wells told Mr. Sachs
10 that there should be an avoidance of any mention of

11 health or biologic consequences in the report or in
12 any other documentation pertaining to the
13 experiments; correct?
14 A. I see what's written in this document.
15 Q. And other documentation that pertains to
16 experiments includes lab notebooks; doesn't it?
17 A. That could be related.
18 Q. Now as of 1984 the industry hadn't actually
19 tested the cigarettes that had been marketed with
20 respect to its ingredients; correct?
21 A. Well actually a lot of work had been done, both
22 within the industry and outside the industry.
23 Q. Can you direct your attention to Exhibit 21504.
24 That would be in the same book, sir.
25 A. I'm not sure if it is in the same book.

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12222

1 Q. I'm sorry. Were you in volume two?
2 A. Yes.
3 Q. It's right towards the front.
4 A. It's in volume two?
5 Q. Yes.
6 A. 21504?
7 Q. Towards the front.
8 A. Oh, yes, okay.
9 Q. About the fourth one -- fourth or fifth one in.
10 Do you have it?
11 A. Yes.
12 Q. That's a memorandum by Mr. McDermott. Do you
13 know Mr. McDermott?
14 A. The name is familiar.
15 Q. He's a lawyer at Jones Day?
16 A. Yes. I've met him.
17 Q. You've met him; haven't you?
18 A. I believe so.
19 Q. Mr. Weber's partner?
20 A. Pardon me?
21 Q. It's Mr. Weber's partner.
22 A. I don't know who Mr. Weber is.
23 Q. Okay. Do you know Mr. Edwards?
24 A. Yes.
25 Q. Okay. And you know Mr. Maynard Thomson?

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12223

1 A. Yes.
2 Q. Have you worked with these people before?
3 A. Yes, I have.
4 Q. All right. Now this is a memo, and I'll
5 represent to you -- and you can confirm this if you
6 look through the document -- that it was written
7 sometime after 1984. Can you accept that, sir?
8 A. Yes.
9 Q. Have you seen this document before?
10 A. I've --
11 I believe so, but it's hard to tell because this
12 copy seems to have a lot of deletions or redactions.
13 THE COURT: Counsel, will you approach the
14 bench, please.
15

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12224

1 (Side-bar discussion as follows:)

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(Side-bar discussion concluded.)

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12225

1 (Discussion between Mr. Bernick
2 and the witness.)

3 BY MR. CIRESI:

4 Q. Have you reviewed the document before, sir?

5 A. Yes.

6 Q. When did you first review it?

7 A. I believe I -- I saw this when I was at R. J.
8 Reynolds, but I've also recently reviewed it in the
9 last couple of days.

10 Q. You saw the document when you were at R. J.
11 Reynolds; is that correct?

12 A. I believe so. Because when I saw it recently,
13 it's -- I seem to have recognized it. I remember
14 something about it.

15 Q. Now can you direct your attention to the page
16 which bears the Bates numbers, last three, 123.

17 A. These are in handwriting, handwritten Bates
18 numbers?

19 Q. That's correct.

20 A. Yes.

21 Q. "The ingredients issue potentially poses
22 significant issues which go to the very heart of
23 general causation. Both the industry and its critics
24 have conducted the bulk of their research using
25 "Kentucky Reference Cigarettes."

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12226

1 Do you know what a Kentucky Reference Cigarette
2 is?

3 A. Yes.

4 Q. What is it?

5 A. It's a --

6 Well it's a reference cigarette that has a
7 standard blend, standard design, to be used as a
8 control in experiments that are used to compare
9 effects of various cigarettes, so it serves as sort
10 of the control or the anchor against which all other
11 comparisons are made.

12 Q. Kentucky Reference Cigarettes are not sold
13 commercially; correct?

14 A. No.

15 Q. No, they're not?

16 A. No, they're not.

17 Q. "These cigarettes are supplied by the members of
18 the industry. Although we have not yet obtained the
19 precise formula for all of the Kentucky Reference
20 Cigarettes, our present understanding is that few
21 casing materials and no top dressings are added."
22 Correct?

23 A. That's what the document says, yes.

24 Q. And there is more than one formula for Kentucky
25 Reference Cigarettes; aren't there?

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12227

1 A. Well there are -- are several design features to
2 achieve -- essentially to span the range of
3 cigarettes that are typically found in the U.S.
4 market. That's what they're designed to do, is -- is
5 mimic U.S. cigarettes. So --

6 Q. So they don't --

7 A. So there's a range of them.

8 Q. Excuse me, go ahead.

9 A. So there's a range of them, low tar, high tar,
10 filtered, non-filtered, that sort of thing.

11 Q. "The cigarettes are made to vary by tar and
12 nicotine content, so it is probable that they contain
13 the same residual amounts of processing agents that
14 are found in commercial cigarettes." Correct?

15 A. That's what the document says.

16 Q. And that would be your understanding; correct?

17 A. It depends on what -- what sort of materials
18 were used, like what sort of reconstituted tobacco,
19 what sort of expanded tobacco, what process was used.
20 But I -- I think that since these were designed to be
21 representative of commercial cigarettes in the U.S.
22 market, I would expect that they are.

23 Q. They run the range; correct, sir?

24 A. Pardon?

25 Q. They run the range, but they do not have the top

12228

1 dressings and few casing materials; correct?
2 A. They have --
3 They have two of the major ingredients that are
4 used in cigarettes as far as total amount of
5 ingredient added. They have two ingredients.
6 Q. I didn't ask you which was the most amount.
7 What I said was they have few of the top casings.
8 A. Well --
9 Q. Or top dressings.
10 A. -- you mean top dressings?
11 Q. Few casing materials; is that correct?
12 A. They don't contain top dressings. They do
13 contain casing materials.
14 Q. And few of them; correct?
15 A. Well do you mean few from a number --
16 Q. Yes.
17 A. -- or from the total or mass amount?
18 Q. Few from a number, sir.
19 A. From a number, yes.
20 Q. "If ingredients are claimed to be the 'cause' of
21 disease, then both the industry and its critics have
22 tested the wrong product, and much of the prior
23 research is flawed. Thus, both sides would be hard
24 pressed to rely on that research to support their
25 respective positions on general causation." Is that

12229

1 right?
2 A. Well you read that correctly.
3 Q. Okay. And if you go over to page 8127.
4 Actually, before we get there, maybe we could
5 back up, doctor, two pages, which starts with the
6 words "The industry has dropped...." Do you have
7 that?
8 A. Yes.
9 Q. Okay. "The industry has dropped a number of
10 ingredients over the years. Recently, a number of
11 ingredients were dropped by the industry just prior
12 to submitting the first annual list of ingredients to
13 HHS, as required by the federal statute enacted in
14 1984." Correct?
15 A. Yes, I see that.
16 Q. And that's what Reynolds did when you were
17 there; correct?
18 A. Reynolds did simplify some of its formulations
19 prior to submitting its composite list to the HHS.
20 Q. And what Mr. McDermott and the others report
21 here is as follows. "Although a few ingredients were
22 dropped in earlier years because of the allegations
23 concerning adverse health effects in the use of those
24 substances for applications different from cigarettes
25 (for example, coumarin), most were dropped either

12230

1 because of changes in formulations or because of

2 feared 'public relations' problems." Correct?
3 A. That's what it says, yes.
4 Q. And if you go on to page seven then. Find it?
5 A. Well I'm following it on the screen here.
6 Q. All right. Down at the footnote it says, "A
7 corporate midconduct test premised upon ingredients
8 would consist of claims of testing which was both
9 belated and inadequate, failure to make adequate
10 inquiry into the composition of flavors produced by
11 outside flavor houses" --
12 Now let me stop there. Do you know how many of
13 the flavors incorporated in RJR cigarettes when you
14 were there were from outside flavorhouses?
15 A. I believe most of them. I don't know by number.
16 Q. The vast majority; isn't that right, sir?
17 A. I don't know if it's the vast majority. I think
18 most of them were in fact formulations from
19 flavorhouses.
20 Q. Okay. Let's go back to the document then.

21 -- "and the failure to remove ingredients known
22 or shown to be harmful. There are memoranda in the
23 RJRT files which reflect a desire by R&D personnel to
24 test ingredients and which document the policies
25 which the company has followed. A recent memo by a
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12231

1 Lorillard employee (Alex Spears) to Dr. Hayes at RJRT
2 suggests that in 1984 the Committee of Counsel
3 thwarted the industry scientists' desires to assure
4 the safety of the product by testing ingredients
5 adequately." Do you see that?
6 A. Yes, I see that.
7 Q. Now you know Dr. Spears?
8 A. Dr. Spears? Yes.
9 Q. He is now the CEO of Lorillard?
10 A. Yes.
11 Q. And at one point he was in charge of R&D for
12 Lorillard?
13 A. I believe so.
14 Q. Can you go over to page 12 of this document.
15 A. Twelve. Ah --
16 Q. Well I'm sorry, 132. It's got 12 at the top,
17 and the last three Bates numbers 132.
18 A. All right.
19 Q. And at the bottom there, you see the paragraph
20 (c)?
21 A. Yes.
22 Q. "RJR has monitored the scientific literature
23 concerning ingredients. Many ingredients have not
24 been tested either as pyrolytes or through the
25 inhalation route." Do you see that?

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12232

1 A. Yes, I see that.
2 Q. And it also says that, as we see above, that
3 RJRT has monitored the scientific literature though;
4 correct?
5 A. Yes.
6 Q. Now that's what you do. You monitor the

7 scientific literature; don't you, sir?
8 A. I do a lot of things, and that's among the
9 things that I do.
10 Q. And can you direct your attention to Exhibit
11 26213. It's in the same volume, sir. It's toward
12 the back.
13 A. Oh, okay.
14 Q. Do you have it?
15 A. I'm getting there.
16 Okay.
17 Q. Do you have it, sir?
18 A. Yes.
19 Q. All right. This is a BATCo document?
20 A. Yes.
21 Q. Dated January 26, 1993, from Mr. G. A. Read to
22 Norman Davis; correct?
23 A. Yes.
24 Q. And that's Graham Read?
25 A. Yes.

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12233

1 Q. And you know Mr. Read?
2 A. Yes.
3 Q. Okay. And what is his position at BATCo?
4 A. He is the vice-president of research and
5 development for BATCo.
6 Q. Okay. And Mr. Davis, what is his position?
7 A. I'm not sure of his exact title. I think he's a
8 senior executive over operations in Europe.
9 Q. All right.
10 MR. CIRESI: Your Honor, we'd offer Exhibit
11 26213.
12 MR. BERNICK: Same objections as previously
13 noted in our briefing, Your Honor.
14 THE COURT: Court will receive 26213.
15 BY MR. CIRESI:
16 Q. Again, sir, do we see that this is a January 26,
17 1993 memorandum from Mr. Read to Mr. Davis? Correct?
18 A. Yes.
19 Q. And on the left-hand side we have the legend
20 that this is privileged and confidential, claimed to
21 be, produced as required by the court's March 7th, --
22 A. Yes.
23 Q. -- 1998 order?
24 A. Yes.
25 Q. When is the first time you reviewed this

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1 document?
2 A. Within the last couple of days, just like all
3 the other documents you sent over.
4 Q. Now this document, when you reviewed it, you saw
5 that it chronicled what the various companies were
6 doing as of 1993 with regard to additives; correct?
7 A. Yes.
8 Q. And this is after legislation was passed;
9 correct?
10 A. Yes.
11 Q. And you were referenced in this.

12 A. Yes.
13 Q. And you're referenced as fulfilling a paper-
14 review role; correct?
15 A. Well that's what the document says. That's -- I
16 don't think that's an adequate characterization of
17 what I do.
18 Q. I'm just asking what the document says. If we
19 can go over to the second page -- well let --
20 Let's start at the bottom of the first. "In
21 sensitive discussions....," do you see that, the last
22 paragraph?
23 A. Yes.
24 Q. "In sensitive discussions with Philip Morris" --
25 That's PM; correct?

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12235

1 A. Yes.
2 Q. -- "they indicated that depending on the
3 relative importance of the additive they are prepared
4 to conduct a range of in vitro toxicological and
5 biological tests as well as acute and chronic animal
6 testing."
7 A. Yes.
8 Q. "The position taken by Reynolds is a matter of
9 public record." Correct?
10 A. Yes.
11 Q. Okay. And Reynolds' position --
12 A. That's what it says.
13 Q. Okay. And Reynolds' position is basically the
14 same as of 1993; is it not?
15 A. The same as what? Compared to what?
16 Q. As Philip Morris.
17 A. I don't know.
18 Q. Okay. When we're talking about a range of in
19 vitro toxicological and biological tests as well as
20 acute and chronic animal testing, you're talking
21 about the type of tests such as an Ames test;
22 correct?
23 A. Yes.
24 Q. The one that you testified on direct gave you
25 inconsistent direction; isn't that correct?

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1 A. Well inconsistent direction insofar as
2 developing a safer cigarette is concerned.
3 Q. And biological tests would be animal testing;
4 correct?
5 A. Yes.
6 Q. And you also said that those don't give you
7 consistent direction as far as developing a safer
8 cigarette. Is that what you said?
9 A. Well in --
10 And what I said was that no one in the
11 scientific community or public health community has
12 been able to point to any test and tell us that if we
13 can make a cigarette that does not produce a response
14 from that test, then that will mean the cigarette is
15 safe. That's what I meant by no consistent direction
16 from these tests.

17 Q. But you didn't mean to imply by that that these
18 are not a piece of the puzzle that should be done and
19 can be done in order to determine and learn
20 scientific information.
21 A. No, not at all.
22 Q. And scientists look to a variety of tests and
23 studies to put together to arrive at opinions and
24 conclusions; don't they?
25 A. Yes.

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12237

1 Q. And you can't expect one individual test to be
2 the panacea for everything; can you?
3 A. Not in toxicology. Perhaps -- perhaps in other
4 areas.
5 Q. And if you go on to the next page then, "B&W
6 fits into this U.S. scenario by undertaking
7 toxicological data review and occasionally takes
8 third party expert opinion whereas it has no
9 biological and toxicological testing of its own and
10 appears to take comfort from the fact that it is
11 party to the U.S. industry list. This 'paper review'
12 role is fulfilled by Scott Appleton an ex-Reynolds
13 employee who joined two years ago and this broadly
14 constitutes B&W's AMGP function." Correct?
15 A. That's what the document says. But we rely a
16 lot on work actually that BATCo does for us, so
17 apparently Mr. Read is drawing a distinction between
18 what BATCo provides us and what's done in our own
19 laboratories.
20 Q. And sir --
21 A. And also we have access to a lot of other
22 toxicological information that's shared within the
23 industry and is published in the open published
24 literature.
25 Q. Sir, what I read is what's reported in this

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12238

1 letter by the vice-president; correct?
2 A. Yes, you read that letter correctly.
3 Q. And AMGP, do you know what that stands for?
4 A. Yes.
5 Q. What does it stand for?
6 A. Additives and Materials Guidance Panel.
7 Q. And the Additives and Materials Guidance Panel,
8 is that HHS?
9 A. No.
10 Q. Where is that, sir?
11 A. That's an internal advisory group within BATCo.
12 Q. Now you referenced in your direct testimony
13 American; correct?
14 A. Yes.
15 Q. Now did you receive in-house American documents
16 that you could review to determine what their
17 biological testing was, if any?
18 A. I have reviewed documents, yes, from American
19 Tobacco.
20 Q. How many documents were provided to you from
21 American Tobacco?

22 A. I -- I don't know the number. It seems like
23 about 20 or 30, maybe 40 or 50.

24 Q. When?

25 A. Within the last week or two.

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12239

1 Q. Did you keep a list of those documents?

2 A. Well we've discussed them. These are -- these
3 are documents that I talked about in my testimony.

4 Q. Sir, on your direct testimony you didn't talk
5 about anywhere near 50 documents. Did you --

6 Did you keep a list of 50 documents generated by
7 American Tobacco Company over the years with regard
8 to testing?

9 A. Well I don't know if we're talking about the
10 same set, but my attorney put the stack right here in
11 the corner of the desk.

12 Q. Oh, you're talking about the Medical College of
13 Virginia documents. Is that the ones?

14 A. Yes.

15 Q. Where he went through and read it and they were
16 iterations where they'd repeat what had been done
17 before and then there was a subsequent one and it had
18 additional information?

19 A. Well it was a stack of reports that American had
20 received over the years from the Medical College of
21 Virginia.

22 Q. All right. Other than that, did you ever see
23 any in-house American biological testing data?

24 A. No, I haven't.

25 Q. Not a single sheet; have you?

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12240

1 A. No in-house testing, no.

2 Q. Now can you turn to Exhibit 21951.

3 A. Also in volume two?

4 Q. Yes. It's toward the beginning, sir.

5 This is a memorandum consisting of 56 pages from
6 Janet Brown of Chadbourne & Parke, a law firm. Have
7 you reviewed this before?

8 A. Yes, I have.

9 Q. Okay. When's the first time you reviewed this?

10 A. Probably about two weeks ago.

11 Q. How did you have occasion to review this?

12 A. My attorneys gave it to me.

13 Q. And this is a "CONFIDENTIAL MEMORANDUM TO MR.
14 HETSKO RE CONFERENCE WITH MESSRS. HARLAN AND HARLOW;"
15 correct?

16 A. Yes.

17 Q. Dated August 25th, 1965; correct?

18 A. Yes.

19 Q. Now do you remember when I asked you earlier, I
20 think it was yesterday, who Mr. Hetsko was and you
21 said you didn't know?

22 A. No, I think I said I recall the name from
23 somewhere, and then I think I remembered where I
24 recalled the name from.

25 Q. Okay. So two weeks ago you had seen this

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1 document, and did you learn that he was the general
2 counsel at that time of American?
3 A. I believe -- I believe so.
4 Q. And Mr. Harlow was the research director at
5 American?
6 A. I -- I believe so, yes.
7 Q. And Mr. Harlan worked in the research
8 department?
9 A. Yes.
10 Q. And this referred to a conference which began at
11 about 9:30 and concluded at 4:30 p.m. on August 25th,
12 1965?
13 A. Yes.
14 Q. And the conference opened with the explanation
15 by Janet Brown that she was there at the behest of
16 Mr. Hetsko; correct?
17 A. Yes.
18 Q. And that the purpose of the visit was to explore
19 with them the background, purposes, and proposed
20 modus operandi of the postulated biological program
21 which Hetsko had just recently learned about;
22 correct?
23 A. Yes.
24 Q. And the second purpose was to review some of the
25 most fundamental programs -- problems a program of

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1 the nature indicated in Mr. Harlow's memorandum to
2 Mr. Hetsko would pose for the company in its public,
3 medical, and legal positions in the health
4 controversy?
5 A. Yes. I mean yes, you've read that correctly.
6 Q. All right. And then do you see at the -- at the
7 bottom of that page, "At the conclusion of the
8 conference Harlow stated the opinion that the program
9 contemplated would make the Company's past and
10 current position in the health field untenable?" Do
11 you see that?
12 A. Yes, you've read that correctly.
13 Q. Now American's position as of 1965, and had been
14 in the past, was that smoking didn't cause any
15 disease; correct?
16 A. I don't --
17 I'm not familiar with American Tobacco's
18 position or when --
19 Especially in this period of time, I just don't
20 know what their position was.
21 Q. Well you know that's their position today; don't
22 you?
23 A. Well that's not --
24 I don't know what their position is today.
25 Q. You don't know what American's position is

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1 today?
2 A. No, not -- not exactly. I don't believe it's

3 smoking does not cause disease, but I don't really
4 know.
5 Q. Do you think American says that smoking causes
6 disease?
7 A. I -- I don't know. I've not been in a position
8 to talk to people at American.
9 Q. Okay. Well you testified here on behalf of
10 American; didn't you?
11 A. On that -- on these -- this research program at
12 the Medical College of Virginia, yes.
13 Q. "Harlow ultimately stated that while the program
14 was important and he wanted to do -- very much to do
15 it, he would certainly not want to do anything that
16 'has an impact on the Company's position or if it
17 makes that position any less sound than it now is.'"
18 Do you see that?
19 A. Yes, I do.
20 Q. And if you turn, sir, to page seven -- and
21 that's seven at the -- on Ms. Brown's numbering
22 system. Do you have it?
23 A. Yes.
24 Q. It's the Bates number 867.
25 A. Yes.

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1 Q. All right. And this is the "Genesis of the
2 Proposed 'Biological' Research Program;" correct?
3 A. That's what it says, yes.
4 Q. All right. "Two prime motives engendered the
5 move to institute a Company biological research
6 program. One was deep dissatisfaction with the
7 conduct of experimental work conducted by
8 independents in this area" --
9 Let me reread it. "One was deep dissatisfaction
10 with the conduct of experimental work by independents
11 in this area." Correct?
12 A. That's what it says, yes.
13 Q. And "The other was the need for commercial
14 security in the development of new products."
15 Correct?
16 A. That's what it says, yes.
17 Q. Now the deep dissatisfaction by independents
18 referred to the Medical College of Virginia; didn't
19 it?
20 A. It referred to specific types of work that they
21 were doing, not the overall program. But from my
22 review of this document, it -- it specifically
23 addressed certain analyses that they were conducting
24 in which these people seemed to have felt they had
25 greater expertise, like nicotine levels in tobacco

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1 and that sort of thing.
2 Q. Did you go back and get the underlying documents
3 to determine what it specifically was?
4 A. No, I think I just testified it's based on the
5 information that's in this document, based on my
6 review of this document.
7 Q. Well let's take a look at what they say about

8 it.
9 "While MCV research has been under the general
10 direction of Haag, and then Larson, neither man has
11 in recent years done the research himself." See
12 that?
13 A. Yes.
14 Q. How Haag and Larson are the authors of a
15 compendium of research regarding smoking and health;
16 correct?
17 A. Yes, and the information that came from that was
18 a direct result of this program sponsored by American
19 Tobacco at the Medical College of Virginia that
20 included a big project to assemble all the
21 smoking-and-health literature and publish it all to
22 make it available to the public, and that was part of
23 what this project and program sponsored.
24 Q. Well let's go on and see --
25 That wasn't my question again. My question was
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1 pretty simple. Again, if you don't understand a
2 question that I ask you, please tell me. All right?
3 A. Okay. I -- I understood your question.
4 Q. "Larson is now so busy that he has little time
5 to devote to anything but the broadest supervision of
6 experimental work. MCV work is done by graduate
7 students - volunteers, in effect, of widely varying
8 competence and abilities, who lack, more often than
9 not, any overriding personal interest in maintaining
10 the highest standards - i.e. those the Company
11 laboratory would maintain.
12 "There is strong feeling, thus, that
13 experimental work which has had to be farmed out to
14 others lacks the scientific standards the Company and
15 the nature of the work demands. Obviously, when the
16 devising, execution, and supervision of the work is
17 sloppy, the results are of questionable scientific
18 meaning."
19 You would agree with that; wouldn't you?
20 A. If in fact this is all a true characterization.
21 If work was sloppy, yeah, that would raise questions
22 about its meaning.
23 Q. Well and it would be fair to state, Mr.
24 Appleton, that Dr. Harlow and Dr. Harlan back in 1965
25 would know much better about what was going on at
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1 that time in deciding whether or not to bring
2 research in-house than you do today about what was
3 going on.
4 A. I'm not suggesting -- I'm not suggesting I know
5 more. I'm just saying I wasn't there, I don't know
6 what the circumstances were around this document and
7 what -- what exactly the discussions were or what --
8 what they're basing their statements on. I just
9 don't know.
10 Q. Well you'll recall from reading it that Mr.
11 Harlow set out some examples just to highlight what
12 was going on; didn't he?

13 A. Yes.
14 Q. He cited as an example "some of the edema
15 experiments in which smoke was passed over the
16 membrane of a rabbit's eye."
17 A. Yes.
18 Q. "The technique of smoke administration was so
19 imperfect that it was not possible to tell either how
20 much smoke each rabbit received or the degree of
21 variation and treatment. The laboratory itself
22 discovered this and had to develop a technique for
23 measurement of smoke so applied.
24 "Reasonably competent independent consultants,
25 not simply graduate students, pose the same problems
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1 in matters of research concepts and techniques,
2 whether development or execution. For example,
3 Foster Snell's techniques for measuring nicotine (in
4 connection with Carlton) were so imperfect that their
5 technicians failed to find any nicotine at all in the
6 first series of tests." Do you see that?
7 A. Yes. And what he's describing are the kind of
8 problems that every laboratory has when they first
9 develop a technique until the time it's -- it's
10 perfected. This would happen in virtually any
11 laboratory when they are first starting up a
12 technique; they go through this sort of learning
13 curve and learning stage. And apparently he's
14 describing some of the issues they weren't covering.
15 Q. Over the years that they had uncovered.
16 "The laboratory had to reconstruct all their
17 procedures (and, says Harlan, Company employees ran
18 the tests in the company's laboratories. This is
19 almost uniformly company experiment -- experience
20 with independents. And Snell is one of the better
21 consulting independents. In short, outside research
22 caliber is not high, competence in problem analysis
23 is dubious, and standards of technique development
24 and execution have been far below the Company's own
25 standards.

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1 "Haag and Larson have long recognized these
2 facts."
3 Do you know how long they recognized those
4 facts, sir?
5 A. How long they had?
6 Q. Yes.
7 A. No.
8 Q. Was it five years?
9 A. I -- I don't know if the document indicates it.
10 What -- the document does, though, is present
11 recommendations and options of how to correct these
12 situations or these problems that were identified by
13 Harlow and Harlan.
14 Q. Sir, do you know how many years they had long
15 recognized it?
16 A. No.
17 Q. Could have been 10 years as far as you know;

18 correct?
19 A. I have no idea. I don't think the document
20 says.
21 Q. And this document is in 1965; correct?
22 A. Yes, I think that's the timeframe.
23 Q. And the first document of the MCV that you
24 showed us was in 1952; correct?
25 A. Well the research began in 1936.
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1 Q. The document was in 1952; correct?
2 A. The document, but it also had reference to
3 studies that were published in 1936 that resulted
4 from the program, plus the -- that was the -- the
5 published part. The original reports that I saw
6 began in 1936, I believe.
7 Q. Well let's go on and see what Haag and Larson
8 say. "In many discussions had with them on this
9 score, they urged that the laboratory do its own
10 work." So in other words, Haag and Larson were
11 saying get it away from the MCV and take it over to
12 your shop. Isn't that what they're saying?
13 A. That appears to be what they're saying, yes.
14 Q. "Recent (over the past few years) repeated
15 discussions with Larson have again resulted in his
16 strong recommendation that the Company undertake its
17 own biological programs -- particularly in the
18 growing field (scientific and commercial) of
19 investigation of effects of smoke components on lung
20 clearance mechanisms. Haag and Larson have long
21 thought well of this work and have felt that the
22 Company is most competent to do it properly."
23 Correct?
24 A. That's what the document says, yes.
25 Q. Now you know that the legal department killed
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1 the program suggested by Dr. Harlan; don't you?
2 A. From my reading --
3 MR. BERNICK: Objection to the
4 characterization, it's argumentative, and it's not
5 supported by the facts in that paper.
6 THE COURT: Do you want to rephrase the
7 question, counsel?
8 MR. CIRESI: I'll rephrase it.
9 BY MR. CIRESI:
10 Q. You know that the program as suggested by Drs.
11 Harlan and Harlow was not undertaken.
12 A. From my reading of this document, the issue is
13 not to do research -- the question was not to do or
14 not to do research. The legal department was fully
15 supportive that biological research needed to be
16 done. The only issue that was debated here, or it
17 seems to me what was being debated is just where to
18 do it. Should it be done in-house or should it be
19 given to a well-renowned university that was well
20 known in this area? And it seemed that for various
21 legal reasons, and most of it stemmed from fear of
22 what could happen in litigation, they felt it was

23 most appropriate to have this research conducted by
24 the Medical College of Virginia as -- as it had been
25 done for 20 years prior. That -- that was -- they
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1 weren't saying let's not do research, they were --
2 they were only talking about where to do the
3 research.
4 Q. Well let me ask the question again.
5 Ms. Brown and Mr. Hetsko, on behalf of the
6 company, said that the research would not be done
7 in-house; correct?
8 A. That -- they --
9 That seemed to be the recommendation for legal
10 reasons. But the research was done. To me that's
11 the important point.
12 Q. You've answered the question. You've answered
13 the question. We'll get on to that.
14 And the reason that it was not done in-house is
15 that they didn't want it ascribed to the company if
16 it showed a causal relationship between smoking and
17 health; correct?
18 A. From my recollection they give a lot of reasons,
19 and I don't remember all of them. That may be among
20 them.
21 Q. Well let's go to page 32.
22 Now by the way, is the Medical College of
23 Virginia a recognized learned institution in your
24 judgment?
25 A. For certain areas, yes. Like all universities
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1 they have strengths and weaknesses, but they're a
2 good university.
3 Q. And Larson and Haag were saying they weren't
4 competent to do this type of work and they should do
5 it at the company; correct?
6 A. I don't know if that's what they were saying. I
7 think they said if you want to do the research, we
8 think you're perfectly capable of doing it, but I
9 don't remember them saying we're incompetent.
10 Q. Well let me go back to page 10 of the document.
11 "Haag and Larson have long thought well of this work
12 and have felt that the Company is most competent to
13 do it properly." Is that what they said?
14 A. Well it seems what they're saying is they
15 thought they were doing a good job, but they think
16 the company would do a good job as well.
17 Q. They thought the company was most competent at
18 the present time to do it properly.
19 A. But they're not saying they're incompetent, what
20 you suggested.
21 Q. All right. Now let's go on to page 32. "When
22 the Company asserts competence to conduct its own
23 biological research into certain aspects of human
24 health, it opens for jury evaluation the question
25 whether it acted reasonably in not instituting
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1 biological research long before now. A substantial
2 scientific literature extending back over many
3 decades has asserted a great variety of pathological
4 effects from the use of tobacco (See, for example,
5 Haag, Larson & Silvette)." Those are the very same
6 people; correct?

7 A. Yes.

8 Q. "A variety of cancers, pulmonary and circulatory
9 diseases have long been claimed to be tobacco linked.
10 Lung cancer, emphysema, heart and peripheral
11 circulatory disease have already become subjects of
12 suits.

13 "If the Company can now inform itself respecting
14 biological effects of smoking, it will be argued that
15 it could and should have done so in all these areas,
16 years ago. Ample funds were at the Company's
17 disposal."

18 You don't deny that; do you, sir?

19 A. No.

20 Q. "Researchers with M.D. degrees were available to
21 devise, conduct and evaluate experiments on animals
22 and man."

23 That could have been done; correct?

24 A. Yes.

25 Q. "Laboratory facilities for such work could

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1 easily have been provided."

2 You agree with that.

3 A. Yes.

4 Q. "What has been found by independent scientists
5 over the years, it will be argued, could have been
6 found long since by the manufacturer whose primary
7 responsibility it was. The question will be raised,
8 for jury resolution, whether a reasonably prudent
9 manufacturer capable of conducting biological
10 research would not have instituted biological testing
11 programs in the 1920's, or the 1930's or the 1940's,
12 eras in which, as evidenced by the Haag, Larson,
13 Silvette book, red flags of warning respecting
14 serious health questions were being raised in the
15 scientific literature. It will be argued that, if
16 such a program was not instituted earlier, it should
17 at least have begun in 1950 to '53, with publication
18 of the four retrospective studies showing association
19 with lung and other cancers; or in 1953, with
20 publication of the Wynder mouse-painting experiments,
21 or in 1954, with the publication of the first
22 Hammond-Horn report" --

23 Now in 1953 and 1954 was when Brown &
24 Williamson, together with others in this industry,
25 issued the Frank Statement; correct?

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1 A. 1954, yes.

2 Q. Where they said that we believe the products we
3 make are not injurious to health; correct?

4 A. That's what it says, yes.
5 Q. Where they said they accepted an interest in
6 people's health as a basic responsibility, paramount
7 to every other consideration in our business;
8 correct?
9 A. That's what it says, yes.
10 Q. "Paramount" means number one; doesn't it, sir?
11 A. Well I would -- I would take it to mean that.
12 Q. And if we go back to what Janet Brown wrote in
13 1965 and pick up with that phrase, "or in 1957, with
14 the publication of the Study Group report on Smoking
15 and Health. Why were such programs not instituted,
16 at least, in 1958, with publication of the final
17 Hammond-Horn report, or in 1959, with the publication
18 of the Surgeon -- by the Surgeon General of an
19 official statement pronouncing a causal link between
20 smoking and certain diseases, or in 1962, with
21 publication of the report of the Royal College of
22 Physicians, or, if not then, why not a year ago, with
23 publication of the report of the Surgeon General's
24 Advisory Committee.

25 "Instituting a biological program today will be
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1 argued to be an implied admission that the Company
2 believes that it has not in the past been doing all
3 it could and should have been doing to find the
4 scientific facts respecting tobacco use and health."

5 Now sir, do you know how many studies since
6 1954, epidemiological studies conducted by varying
7 investigators under varying conditions and protocols
8 in various parts of this country, taking into account
9 all kinds of confounding variables, have shown that
10 cigarette smoking causes disease?

11 A. I don't know the exact number of epidemiological
12 studies that have been conducted. It's been -- it's
13 been a lot. Many have shown an association between
14 smoking and various diseases. And it depends, you'll
15 have to talk about prospective or retrospective
16 studies. But there have been a number.

17 Q. Thousands?

18 A. At least about --

19 I don't know about a thousand. Probably more --
20 probably more in the range of a hundred or so.

21 Q. A hundred studies --

22 A. Epidemiological studies?

23 Q. -- in 40 years?

24 A. Well they're very time consuming and difficult
25 to conduct. I believe there's only been about a

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1 dozen prospective studies. I'm not sure of the exact
2 number. It may be 50 to a hundred retrospective
3 studies, but it hasn't been that many.

4 Q. "We can anticipate, too, that it will be argued
5 as an implied admission that the Company accepts that
6 smoking has been shown to be a cause of pulmonary and
7 other disease. Why, otherwise, would it now
8 institute such a program, reversing its fundamental

9 policy as enunciated in litigation by Company
10 officials?
11 "We cannot say that a jury might not conclude
12 that, if the Company is competent to investigate some
13 biological questions today, the Company could and
14 should have been investigating some or even many such
15 questions one, two, five, ten, or many years ago."

16 Now doctor, it's true, is it not, that in 1958
17 the vast majority of scientists in this country felt
18 that smoking caused lung cancer?

19 A. In that --

20 Well that time period, I would say that there
21 were many scientists who did but many scientists who
22 still weren't -- weren't quite sure. It -- it
23 probably was a majority, but I've got no basis to --
24 I've not -- I've not done a survey of it. I just
25 know I've reviewed the literature at that time, I've

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1 seen views expressed where people questioned the
2 association, and I've seen many views where people
3 say we absolutely think that association is rock
4 solid. I think it was an evolving time period.

5 Q. There's people --

6 There's people today that belong to the Flat
7 Earth Society; aren't there?

8 A. I don't know.

9 Q. Can you direct your attention to Exhibit 11028.

10 A. What binder is that?

11 Q. Binder one. I'm sorry.

12 Now do you recall, doctor, in your testimony on
13 direct, you were talking about the constituent
14 compounds of tobacco and what may cause disease and
15 what not, and you said that we don't know how to
16 modify cigarettes, it's been a long trial-and-error
17 process?

18 A. Yes.

19 Q. That there was no one carcinogen. Do you
20 remember that?

21 A. Or group of substances I believe I said.

22 Q. That's nothing new. That was known in 1958 by
23 the industry; wasn't it?

24 A. I think it may have been suspected by that time
25 that it was unlikely that one constituent or group of

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1 constituents would be identified.

2 Q. Have you had an opportunity to review Exhibit
3 11028?

4 A. Yes.

5 Q. This is a BATCo document; correct?

6 A. I don't know if it's a BATCo document.

7 Q. Well take a look down at the document. "BAT Co
8 Ltd - Minnesota Tobacco Litigation." Do you see
9 that?

10 A. Well I don't know if that means it's a BATCo
11 document or if it was a document generated from
12 elsewhere that was simply found in BATCo's files and
13 produced.

14 Q. Well it was produced by BATCo in this
15 litigation. You understand that.
16 A. Well that I think I can assume from that stamp.
17 I don't know if it means this was authored by BATCo
18 people or not.
19 Q. Do you know if Mr. Felton worked for BATCo?
20 A. That -- that name is familiar.
21 Q. Okay. Do you know if Mr. Reid worked for BATCo?
22 A. I don't know who this Reid is, W. W. Reid.
23 Q. Okay. Was there a Mr. Reid who worked for
24 BATCo?
25 A. Well we talked about Graham Read a moment ago,
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1 but this doesn't appear to be him.
2 Q. Do you know another Reid who worked for BATCo?
3 A. No.
4 Q. When was the first time you saw this document?
5 A. Again, this was probably within the last two
6 weeks.
7 Q. And I'm not going to spend a lot of time, the
8 jury has seen this, but you understand this was a
9 trip report from three people who came over from
10 England to the United States in 1958; correct?
11 A. Yes.
12 Q. And you understand that they visited a number of
13 medical institutions, preeminent medical institutions
14 in this country; correct?
15 A. I -- I believe, yeah, that's my recollection.
16 Q. Including Johns Hopkins in Baltimore, if you go
17 to the itinerary.
18 A. Yes.
19 Q. Sloan-Kettering?
20 A. Yes.
21 Q. The National Cancer Institute?
22 A. Yes.
23 Q. They also visited the TIRC; correct?
24 A. Yes.
25 Q. And that would be the forerunner of the CTR;
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1 correct?
2 A. Yes.
3 Q. They visited with Dr. Little and Dr. Hockett;
4 correct?
5 A. Yes.
6 Q. They visited with the Scientific Advisory Board
7 of the TIRC?
8 A. Yes.
9 Q. They visited with American Tobacco Company?
10 A. Yes.
11 Q. They visited with Liggett & Myers?
12 A. Yes.
13 Q. They visited with Philip Morris?
14 A. Yes.
15 Q. They visited Yale; correct?
16 A. Yes.
17 Q. And if you turn to the next page, these
18 individuals, including Mr. Felton from BATCo, found

19 out in 1958 that "With one exception (H.S.N.
20 Greene)," and he was from Yale, "the individuals whom
21 we met believed that smoking causes lung cancer if by
22 'causation' we mean any chain of events which leads
23 finally to lung cancer and which involves smoking as
24 an indispensable link." Correct?
25 A. That's what it says, yes.

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1 Q. And they also were looking as to whether or not
2 biological testing was being done; correct?
3 A. Yes, that's my recollection.
4 Q. And if you turn to the page which has the number
5 at the top five.
6 A. Yes.
7 Q. You'll see the "ATTITUDE OF U.S. INDUSTRY TO
8 BIOLOGICAL TESTING," that they discovered way back in
9 1958; correct? Do you see that title?
10 A. I don't -- I don't see where it --
11 I see the, yeah, the title, but I don't see
12 where you were making reference to 1958 or the
13 attitudes.
14 Q. Well --
15 A. Or the "ATTITUDE" is in the title. Yes.
16 Q. And the document is a 1958 document; correct,
17 sir?
18 A. Yes.
19 Q. By the way, this is six years before the Surgeon
20 General's opinion; correct?
21 A. Yes.
22 Q. Seven years before the Janet Brown document;
23 correct?
24 A. Yes.
25 Q. "Liggett & Myers stayed out of TIRC originally

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1 because they doubted the sincerity of TIRC motives
2 and believed that the organization was too unwieldy
3 to work efficiently. They remain convinced that
4 their misgivings were justified. In their opinion
5 TIRC has done little if anything constructive, the
6 constantly re-iterated 'not proven' statements in the
7 face of mounting contrary evidence has thoroughly
8 discredited TIRC and the Scientific Advisory Board of
9 TIRC is supporting almost without exception projects
10 which are not related directly to smoking and lung
11 cancer."

12 Now you haven't reviewed the documents to
13 determine what the companies were doing back at that
14 time; have you?

15 A. No.
16 Q. And one of the issues that they were looking to
17 was whether or not, back then, there was what they
18 might call a super carcinogen; correct?
19 A. I think I remember reference to that in this
20 document.
21 Q. And from your review, paper review of the
22 literature, have you determined whether or not there
23 was a theory back in the 1950s as to whether or not

24 there was a super carcinogen that could be removed?
25 A. Well I mean I -- I've never seen --
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12265

1 The only time I've heard of super carcinogen is
2 in this document. But I do recall from a review I
3 have done that there was a belief early on that a
4 particular constituent in smoke might be discovered,
5 that the health effects associated with cigarette
6 smoking may be attributed to one constituent or class
7 of constituents, and the hope was, if removed, then
8 it would make the cigarette safer. So that might be
9 what they were referring to.

10 Q. All right. If you go to the preceding page,
11 page four, do you see the title "RESULTS OF SCREENING
12 TESTS ON SMOKE FRACTIONS?"

13 A. Yes.

14 Q. "One of the main objectives of the visit was to
15 discover whether there were any experimental grounds
16 for believing that cigarette smoke condensate
17 contains only one principal carcinogen which is
18 quantitatively responsible for a large proportion of
19 the biological activity as measured by animal tests
20 (a 'super carcinogen' in Wright's terminology)." Do
21 you see that?

22 A. Yes.

23 Q. Do you know who Wright is?

24 A. No.

25 Q. Now if one is doing --

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12266

1 The reason one does animal tests is you couldn't
2 take a suspected carcinogenic substance and paint it
3 on a human being; could you?

4 A. No.

5 Q. You have to use an animal to do that; don't you?

6 A. That's one of the tests available to us in
7 our -- in our tool box, yes.

8 Q. All right. Because you can't experiment like
9 that on human beings; correct?

10 A. No.

11 Q. And you expect when you do those things that
12 you're going to do it in an accelerated fashion
13 because of the life-span of the animal that you may
14 be using; correct?

15 A. Well I'm not sure exactly what you mean.
16 When -- you --

17 You certainly test over a full range of doses to
18 uncover whatever toxicological manifestations there
19 may be, so you push the dose as high as possible.
20 But the life-span of an animal really isn't at issue
21 because essentially whatever happens in the life-span
22 of a rat, which might be two or three years, will
23 also happen in the life-span of a human, which is
24 more like 70 years. So I don't know what you mean by
25 "accelerate." The tests are not accelerated, but the

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1 doses are pushed high.
2 Q. The doses are pushed high; correct, sir?
3 A. Right.
4 Q. Now if you turn to page nine, you'll find out
5 what the scientists from BATCo and elsewhere found
6 out when they came over in 1958. And actually if you
7 go back to page eight, we'll start there, because
8 that gives you an orientation, sir. You'll see that
9 the "CONCLUSIONS" --
10 A. Yes.
11 Q. -- start at the bottom. Number one, "Although
12 there remains some doubt as to the proportion of the
13 total lung cancer mortality which can fairly be
14 attributed to smoking, scientific opinion in U.S.A.
15 does not now seriously doubt that the statistical
16 correlation is real and reflects a cause and effect
17 relationship." Do you see that?
18 A. Yes, I do.
19 Q. Then you go on to the next page and go to number
20 three. Number three, "The direct carcinogenicity of
21 smoke condensate to animal tissue, which is
22 consistent with direct causation, is now fully
23 confirmed but the evidence so far obtained makes it
24 unlikely that this activity is due to any single
25 'super carcinogen' in smoke." Do you see that?

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12268

1 A. Yes.
2 Q. So that back in 1958, these scientists found by
3 speaking to all of the individuals that they visited
4 with that the belief at that time, based on
5 scientific investigation, was that there was no super
6 carcinogen; correct?
7 A. That's what they're expressing here.
8 Q. Now from 1958 up to 1994, Brown & Williamson has
9 never ever told the public that a low tar cigarette
10 is not safer than a full tar cigarette; has it?
11 A. I don't believe we've made any health-related
12 claims associated with any of our cigarettes, one way
13 or the other.
14 Q. And that would be true right to today; correct,
15 sir?
16 A. That we don't make claims?
17 Q. That you have never said that a low tar
18 cigarette is not safer than a full tar cigarette.
19 A. We don't make health claims about our
20 cigarettes, no.
21 Q. But you know that you have no evidence at all to
22 support any contention that a low tar cigarette is
23 safer than a full tar cigarette. You know that;
24 don't you?
25 A. There is --

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12269

1 There's various types of evidence which -- and
2 it's the same type of evidence that exists which
3 indicates that cigarettes may be hazardous in the
4 first place. There are some epidemiological studies

5 that show that low tar cigarettes or filtered
6 cigarettes compared to non-filtered cigarettes or
7 high tar cigarettes result in a reduced incidence of
8 lung cancer in certain people, and that's been
9 reviewed and described in various epidemiological
10 studies and been -- been described by the Surgeon
11 General. But the problem is that the limitations of
12 that evidence are similar to limitations of all the
13 evidence. It's suggestive, it provides indications,
14 but at the end of the day you can't say that means
15 that cigarettes are safer.

16 Q. So is your answer to my question yes?

17 A. Can you repeat your question?

18 Q. Sure.

19 You know as of today that you have no evidence
20 to suggest or state or confirm that a low tar
21 cigarette is safer than a full tar cigarette.

22 A. Well my answer is that there is evidence that
23 suggests reduced risks, but it isn't sufficient to
24 make the conclusion that in fact those cigarettes are
25 safer.

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1 Q. And indeed, recent epidemiology has shown that
2 even for lung cancer, there isn't any reduced risk;
3 isn't that right?

4 A. I'm not familiar with recent studies that
5 compare low tar to high tar cigarettes.

6 Q. Isn't your job to review the paper?

7 A. Yes, it is.

8 Q. Now can you direct your attention to Exhibit
9 10982, which is in the same book. Do you have it,
10 sir?

11 A. Yes.

12 Q. And this is a BATCo document; correct?

13 A. I assume that it is. It's got -- at least it's
14 been produced by BATCo.

15 Q. And if you look to the back page, you'll see
16 that it's got the initials GFT, and that's Dr. Todd?

17 A. I presume.

18 Q. And the date is March 2nd, 1964.

19 A. Yes.

20 Q. See that?

21 Do you recall --

22 A. Yes.

23 Q. -- that Dr. Todd was the individual who was
24 described by Mr. Yeaman in his memorandum to Mr.
25 Finch as not being malleable? Do you remember that?

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1 A. Somewhat. I -- it's hard for me to keep track
2 of all these names.

3 Q. And Dr. Todd was the director of The Tobacco
4 Research Council; correct?

5 A. I don't know, but I'll accept your
6 representation.

7 Q. And if you can go over to the third page of that
8 document, sir, --

9 A. Yes.

10 Q. -- a "'Safer' Cigarette," do you see that in
11 quotes, "Safer?"
12 A. Yes.
13 Q. Dr. Todd here says, "I asked Roe for his views
14 on what would constitute a safer cigarette. He said
15 that he found this difficult to answer. The
16 epidemiological evidence showed clearly that
17 cigarette smoke caused lung cancer. One had to use
18 animals to find out the substances responsible but
19 animals could only be used in a form of fundamental
20 research."
21 That's what you and I were just talking about;
22 correct?
23 A. In what regard?
24 Q. The fundamental research of mouse skin-painting
25 and --

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12272

1 A. I don't remember talking about it in terms of
2 fundamental research.
3 Q. All right. "It was quite impossible to use
4 animals in a way that would directly reflect the
5 effect of cigarette smoke on the human lung. He
6 found it difficult to apportion significance between
7 'direct carcinogens' and 'irritants.' He thought the
8 tumors were necessarily initiated by direct
9 carcinogens but non-specific irritants could play an
10 important part in promoting growth of tumors once
11 they had been started. It was important to eliminate
12 both and he felt that concentration on either
13 carcinogens or irritants would be wrong." Do you see
14 that?
15 A. Yes.
16 Q. Okay. Now that's consistent with what we saw in
17 the 1958 trip report regarding the super carcinogen;
18 correct?
19 A. Well consistent in that they both seem to say
20 that it's unlikely that any one substance will be
21 found to be responsible for disease associated with
22 cigarette smoking.
23 Q. Correct.
24 A. Yes.
25 Q. Now if you look just a little bit above that

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12273

1 paragraph, do you see the last sentence there
2 starting with "The whole subject was still very
3 confidential" --
4 A. Yes.
5 Q. -- "but was likely to be of considerable
6 importance in the future" --
7 A. Yes.
8 Q. -- "and he suggested that the tobacco
9 manufacturers would be well advised to check that
10 there was no chance of asbestos fibers entering the
11 product" --
12 Do you see that?
13 A. Yes.
14 Q. -- "for example: used in filters."

15 A. Yes.
16 Q. Correct?
17 Now there was asbestos in filters; wasn't there?
18 A. I'm aware of one manufacturer at some period of
19 time having asbestos in their filters.
20 Q. Was that Lorillard?
21 A. That's my recollection.
22 Q. The Kent micronite filter?
23 A. That's my recollection.
24 Q. The one they said was safer; correct?
25 A. I don't recall if they made a statement -- they
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12274

1 made a health claim or not or a safety claim.
2 Q. You have no recollection of that at all?
3 A. No.
4 Q. Your review of the literature did not point that
5 out?
6 A. No.
7 Q. Can you direct your attention to Exhibit 19987,
8 which would be in the volume two, sir, toward the
9 beginning. I believe it's the second document.
10 A. You said 19987?
11 Q. Correct.
12 A. Oh, the first one, at least in my binder it is.
13 Q. You're right, I didn't move that other one. It
14 is the first one in your book.
15 A. Okay.
16 Q. And that's a B&W document?
17 A. It was produced by B&W.
18 Q. And it's dated August 16th, 1957; correct?
19 A. Yes.
20 Q. And it's by a Dr. Davies for J. Kirwan; correct?
21 A. Yes.
22 Q. In the Scientific Control Laboratories of
23 British-American Tobacco Company Limited?
24 A. Yes.
25 MR. CIRESI: Your Honor, we'd offer Exhibit
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12275

1 19987.
2 MR. BERNICK: No objection.
3 THE COURT: Court will receive 19987.
4 BY MR. CIRESI:
5 Q. Is this is the document which is now on the
6 overhead, it's entitled "Cigarette Comparison
7 Report - KENT cigarettes;" correct?
8 A. Yes.
9 Q. And you see in the second paragraph there's a
10 notation, "You will see from this that although KENT
11 filter is described as a MICRONITE Filter the present
12 sample is quite different from the old blue Micronite
13 Filter fitted to the cigarette." Do you see that?
14 A. Yes.
15 Q. And if you go on to the next page -- and again I
16 apologize for the quality, but I'll try to bring it
17 up so you can see it, sir -- do you see the
18 composition of the filter there?
19 A. Yes.

20 Q. And if you go down, you'll see cellulose
 21 acetate?
 22 A. Yes.
 23 Q. And then you have cotton and then you have
 24 asbestos. Do you see that?
 25 A. It appears that's what it says.

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1 Q. And that's consistent with what you have learned
 2 about there being asbestos in the Kent filters;
 3 correct?
 4 A. If it's the same timeframe. That -- that's one
 5 thing I'm not sure about. I know that they used it
 6 for a very short period of time, but what I don't
 7 know is what that period of time was and if that
 8 matches up with this. But I've got no reason to --
 9 to doubt this.
 10 Q. You don't know how long they actually used it;
 11 do you, sir?
 12 A. No.
 13 Q. Now can you go to Exhibit 11913, which is back
 14 in volume one. Do you have that, sir?
 15 A. I'm getting there.
 16 Q. Is your copy good? Does it go all the way over
 17 the side?
 18 A. It's cut off on the right side, except the first
 19 line.

MR. CIRESI: May I approach, Your Honor.
 (Document handed to the witness.)

22 Q. Let me hand you another one, doctor. That one
 23 is complete; correct?
 24 A. Yes.
 25 Q. Okay. Now this is a Tobacco Research Council

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1 document; correct?
 2 A. Yes.
 3 Q. And if you go to the last page there, you'll see
 4 that it's from Dr. Todd --
 5 A. Yes.
 6 Q. -- as director; correct?
 7 A. Yes.
 8 Q. This is in 1967; correct?
 9 A. Yes.
 10 Q. Same Dr. Todd that we just saw in the other
 11 document; correct?
 12 A. I assume so.
 13 Q. The same one you assume that was said not to be
 14 malleable; correct?
 15 A. I -- I forgot that reference. I mean I remember
 16 that -- that particular passage, but I forgot who it
 17 was pertaining to.
 18 Q. Well would you accept my --
 19 A. Yes.
 20 Q. -- statement that it was Dr. Todd?
 21 A. I'll accept that statement, yes.
 22 Q. Okay. Now this is to Addison Yeaman; correct?
 23 A. Yes.
 24 Q. And Addison Yeaman, he's the one that said Dr.

25 Todd, he's not malleable; is that right?
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1 A. If I accept your representation, yes. I mean
2 I -- I assume he expressed that view. He was the one
3 who expressed that view, and it was about Todd who he
4 was talking.

5 Q. All right. And it says "Dear Add." This is
6 private letter number 15; correct?

7 A. Yes.

8 Q. If you go down to the third paragraph, "The only
9 real difficulties that we encountered arose out of
10 the unavoidable paradox at the centre of our
11 operations - namely that on the one hand the
12 manufacturers control TRC's operations and do not
13 accept that smoking has been proved to cause lung
14 cancer while, on the other hand, TRC's research
15 program is based on the working hypothesis that this
16 has been sufficiently proved for research purposes."
17 Do you see that?

18 A. Yes.

19 Q. "In addition, the Council's senior scientists
20 accept the causation theory and work for the Council
21 because they are interested in trying to solve what
22 they consider to be an urgent human health problem.
23 We have not yet found the best way of handling this
24 paradox." Do you see that?

25 A. Yes, I do.

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1 Q. Now one way to handle the paradox would be to
2 speak the truth; wouldn't it? To let the scientists
3 control. Wouldn't it, sir?

4 A. I think the best way to handle the paradox is to
5 allow the research to happen.

6 Q. And to let the scientists control; correct?

7 A. Well certainly to let the scientists do their
8 job.

9 Q. And if the scientists believe and accept
10 causation, then the Frank Statement should say we
11 believe the products we make are injurious to health,
12 if that's what the scientists believed; correct?

13 A. Well the scientists had various views about
14 this. And it was a complicated issue. In order to
15 make a scientific statement about this, you would
16 have to describe all the information and describe
17 what it says and what it doesn't say.

18 Q. Well is that --

19 A. This is a simplified statement. I don't view
20 this as a technical statement.

21 Q. Well this is a statement about health.

22 A. It's a statement --

23 Q. They don't have all kinds of information in
24 here; do they?

25 A. No. It's -- and that's -- that's the way these

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1 statements are typically made, like the warning on
2 the pack, and it's an expression of belief.
3 Q. Well if --
4 A. It isn't -- it isn't --
5 To me this isn't an expression of a scientific
6 view or technical view.
7 Q. Is that what this says? Did they say that?
8 MR. BERNICK: Excuse me. Can the witness
9 be permitted to answer his questions fully?
10 THE COURT: I think he's finished.
11 THE WITNESS: No, I wasn't finished
12 actually. What --
13 MR. CIRESI: Sir --
14 THE COURT: Is this responsive to the
15 question asked?
16 THE WITNESS: I'm sorry. Could you please
17 repeat the question?
18 MR. CIRESI: Yeah, I'll start with the
19 question again.
20 BY MR. CIRESI:
21 Q. If the scientists believe the causation theory,
22 the scientists --
23 A. Yes.
24 Q. Do you understand that?
25 A. Yes.

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12281
1 Q. Okay. If the scientists believe that, then what
2 this statement should say is we believe the products
3 we make are injurious to health; correct?
4 A. It depends upon what -- it depends upon what the
5 scientists are saying. If they are saying we make
6 the assumption based on the epidemiology that smoking
7 causes disease, then it should say that. If it says
8 there is some suggestive evidence from the
9 experimental research, then it should say that. But
10 those to me, to talk about it in scientific terms,
11 you have to be precise and careful about everything
12 that's there.
13 Now if you're making a public health statement,
14 I do believe that more simple, emphatic statements
15 are probably the way to go, and that's what the
16 Surgeon General and others have done. But to express
17 it in scientific terms, you'd need to be able to
18 discuss -- to be accurate and careful, you'd need to
19 be able to discuss all the issues, and that would be
20 a complicated -- it's a complicated message.
21 Q. Where is that here, sir? Where is the
22 scientific epidemiology when they say we believe the
23 products we make are not injurious to health? Where
24 is it?
25 A. I'm not sure what that statement is based on.

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12282
1 It's probably more of a reflection of doubt about
2 what the complete science says.
3 Q. Where --
4 Can you answer my question? Where is the
5 epidemiology here? What did they say?

6 A. Well it's not described. That's what I'm
7 saying.

8 Q. Where do they say in here, these companies,
9 well, you know, we believe it's not injurious to
10 health because there's some information that suggests
11 that it may be, but then there's other that says that
12 it isn't. Where does it say that here?

13 MR. BERNICK: Your Honor, I object to the
14 form of the question and the argument of counsel
15 through his gestures and the tone of his voice. It's
16 not a factual question that's being asked of this
17 witness.

18 THE COURT: You may answer the question.

19 A. What I'm saying, sir, as you're suggesting, if
20 the scientists made the statement, this statement
21 would be relatively complicated because it would
22 entail a lot of details about what's known and what's
23 not known. You'd have to talk about the experimental
24 evidence, what it shows and doesn't show, describe
25 the conditions under which the tests are done, you'd

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1 have to describe the epidemiological evidence, the
2 nature of the different types of studies, how much
3 confidence we had in the various studies of a
4 prospective nature or retrospective. It would entail
5 a lot of discussion. And that's the way we as
6 scientists talk about it. We look at this more from
7 the experimental side because we're challenged with
8 the task of making a safer cigarette, and the
9 experimental evidence is the only way we can get to
10 that. We can't get to that through the epidemiology.
11 So we tend to view it more from the experimental
12 side.

13 Q. Are you done?

14 A. No.

15 Now this statement reflects more of a belief and
16 a simple statement, and I don't think that having a
17 scientific expression would be appropriate in this
18 kind of a statement.

19 Q. Well --

20 A. But also I -- I think that this statement was
21 done back in 1954 where the science was relatively
22 immature, and I think it's difficult to try to judge
23 this statement today in 1998 against the standards --
24 today's standards compared to what was done 40 years
25 ago.

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1 Q. Are you done now?

2 A. Yes.

3 MR. CIRESI: Move to strike,
4 non-responsive.

5 THE COURT: Sustained.

6 BY MR. CIRESI:

7 Q. Now sir, let me go back to the question. If the
8 scientists -- let me ask you another question.

9 Was the statement, "We believe the products we
10 make are not injurious to health," based on

11 epidemiology?
12 A. Well I don't know really what it was based on --
13 Q. Was it based on animal studies?
14 A. Are you done?
15 Q. Yeah, I --
16 A. I tried to answer --
17 Q. -- try to keep it short.
18 A. I'm sorry. I tried to answer and you stopped
19 me.

20 I don't know what the statement was based on, I
21 wasn't there, I wasn't involved in the development of
22 that statement. I don't know what evidence was
23 reviewed or not reviewed or what the genesis of that
24 statement was.

25 Q. So you have no idea what it was based on; is
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1 that what you're saying?
2 A. No, I don't.
3 Q. Have you made any investigation as to what it
4 was based on?
5 A. No, I haven't.
6 Q. Do you know if they had a scintilla of evidence
7 to support that statement?
8 A. They may have. I don't know.
9 Q. You just don't know; correct?
10 A. No, that's correct.
11 Q. Has Brown & Williamson ever retracted that
12 statement?
13 A. Not to my knowledge.

14 THE COURT: Why don't we take a short
15 recess.

16 THE CLERK: Court stands in recess.
17 (Recess taken.)

18 THE CLERK: Court is again in session.
19 (Jury enters the courtroom.)

20 THE CLERK: You may be seated.

21 THE COURT: Counsel.

22 MR. CIRESI: Thank you, Your Honor.

23 BY MR. CIRESI:

24 Q. Doctor, can you direct your attention to Exhibit
25 10950, which is in volume one 10950.

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12286

1 A. I've got it.
2 Q. That's a B.A.T. Company document regarding a
3 "Conference on Inhalation Toxicology" at Southampton,
4 August 7th To 9th, 1974.
5 A. Yes.
6 Q. And you see that it's authored by E. B. Wilkes?
7 A. Yes.

8 MR. CIRESI: Your Honor, we would offer
9 Exhibit 10950.

10 MR. BERNICK: No objection.

11 MR. CIRESI: Court will receive 10950.

12 BY MR. CIRESI:

13 Q. Now the title is "Conference on Technology,
14 Group Research & Development Centre, Southampton 7th
15 to 9th August 1974;" correct?

16 A. Well it's "Toxicology," I think you said
17 "Technology."
18 Q. "Toxicology," thank you.
19 And if you go to the last page, you'll see the
20 author is E. B. Wilkes; right?
21 A. Yes.
22 Q. And you see the distribution also goes to Dr.
23 Felton; correct?
24 A. Yes.
25 Q. That's Dr. Felton we saw in the trip report
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1 which was Exhibit 11028, which was in 1958; correct?
2 A. I assume so, yes.
3 Q. About 16 years before this; correct, sir?
4 A. Yes.
5 Q. If we go back to the first page, Dr. Wilkes, do
6 you know who he is?
7 A. I've never let him.
8 Q. Says, "These comments are a personal reflection
9 upon the outcome of the three days proceedings."
10 Correct?
11 A. Yes.
12 Q. And he references the fact that he was
13 disappointed by the somewhat negative approach of the
14 section of the conference devoted to the methodology
15 of animal exposure to cigarette smoke; correct?
16 A. Yes.
17 Q. And he referenced "A great deal of discussion
18 centered around -- centered around two areas of
19 difficulty:
20 "(a) lack of response in animal species" and
21 "dosimetry." Correct?
22 A. Yes.
23 Q. Do you know what dosimetry is?
24 A. Yes.
25 Q. What is it, sir?
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1 A. That's characterizing the dose of the test
2 article that the animals get.
3 Q. The measuring of the dose; correct?
4 A. Well that's included in characterizing it.
5 Q. And he says that "At the end of three days of
6 debate the net result seemed to me to be the
7 conclusion that because the animals do not respond to
8 smoke exposure and because it is difficult to measure
9 dose at the target tissue, dose/response experiments
10 are pointless. As a correlary it was concluded that
11 since dose/response experimentation was not worth
12 pursuing, statistical analysis of the data was
13 largely irrelevant." Correct?
14 A. That's what it says.
15 Q. Then he goes on to state the reasons why he
16 found these conclusions disappointing; correct?
17 A. Yes.
18 Q. And he mentioned the work of Dontenwill,
19 correct?
20 A. Let me get there.

21 Q. Right under subparagraph (a). Do you see the
22 reference to Dontenwill?
23 A. Yes.
24 Q. Okay. The same Dontenwill work that you were
25 told about when you met with Shook, Hardy & Bacon;
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1 right?
2 A. I assume so.
3 Q. And if you go over to the next page, at the
4 bottom of the page he suggests that there's been
5 enough work done in the animal area to suggest that
6 continued work be done there; correct?
7 A. Let me finish reading it. I'm having trouble
8 reading this one, so --
9 Q. Take a look at the hard copy, sir. It's easier
10 to read. Page two at the bottom.
11 A. Yes, I'm there. I'm -- I'm just reading it.
12 Yes, I see it.
13 Q. Okay. And he's saying that it's a suggestion
14 which the conference chose to ignore, correct?
15 A. That's what it says.
16 Q. Then he goes on to state, "The fact that
17 accurate dosimetry is difficult and that it is almost
18 imposition to measure the exact dose received by the
19 target tissue in the animal species exposed to smoke
20 does not seem to me to constitute a valid reason for
21 not attempting does/response studies;" correct?
22 A. That's what it says.
23 Q. Then he goes on to state, "But are assumptions
24 of this kind necessarily so bad? The tobacco
25 industry has become involved in the investigation of
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1 the biological consequences of smoking as a result of
2 the outcome of a large dose/response experiment."
3 Do you know which experiment he's relating to?
4 A. No.
5 Q. It's the human experience; isn't it, sir?
6 A. I don't know if that's what he says or if that's
7 what he's saying.
8 Q. You read this document; didn't you?
9 A. I don't know if I've seen this one.
10 Q. Okay. "In this experiment no dosimetry was
11 used, there was no control over the frequency of
12 smoking or the concentration of smoke used, and there
13 was no attempt at random distribution of the test
14 animals to the various levels of exposure. And yet a
15 clear dose/response relationship emerged."
16 "I am referring of course to the
17 epidemiological study of the smoking habit in man.
18 Generally speaking, the only measure of dose is the
19 number of cigarettes sold to the customer. Little
20 information is available about the frequency of
21 smoking, the frequency of puffing, puff parameters,
22 butt lengths, et cetera. At first the dose/response
23 relationship seemed tenuous and was occasionally
24 challenged. But now, after many and various
25 epidemiological studies, few people doubt the

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1 existence of the dose/response relationship in men.
2 Ratios of risk to disease derived from numbers of
3 cigarettes smoked (on average) per day have been
4 computed, as have the ratios of urban to rural
5 disease risk. All without accurate dosimetry.
6 "I therefore find it difficult to accept that
7 in animal experiments, where we can exercise a much
8 tighter control over the exposure regimes, and can
9 undertake some dosimetry studies (albeit on a limited
10 scale), dose/response relationships are unobtainable.
11 I admit that many assumptions are necessary. But I
12 tend to believe that, as in the human study,
13 gradually only one result will be tenable i.e. that
14 there is a dose/response relationship in the animal
15 species, and that this relationship is obtained from
16 exposure/response comparisons.
17 "I believe that we could now, using currently
18 available data, set up a viable dose/response
19 experiment. Using Dontenwill's techniques the number
20 of animals involved need be no greater than those
21 used in a comparable mouse skin-painting test. The
22 statistical analysis would be formidable, involving
23 many assumptions. But I would suggest that the
24 difficulties are there to be overcome, not to provide
25 an excuse for not acting.

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1 "Whether we like it or not, the human experiment
2 will continue, and will be monitored by many whose
3 sole objective is to discredit the tobacco industry.
4 If the results of this experiment tend to go against
5 us, and if it is -- if it is shown that we failed to
6 make a vigorous attempt to assess the biological
7 activity of the smoke from our products, the
8 consequences of our inactivity could be disastrous."
9 Do you see that?
10 A. Yes.
11 Q. And the human experience has continued since
12 1974; hasn't it, doctor?
13 A. Well people do smoke, that is true.
14 Q. And millions of people have started to smoke
15 since 1974; haven't they?
16 A. I assume so.
17 Q. And most of those who start to smoke are under
18 the age of 18; correct?
19 A. I don't know the ages of when people start to
20 smoke. Certainly people under the age of 18 begin
21 smoking.
22 Q. Are you aware that in excess of 80 percent of
23 the people who start smoking start before the age of
24 18?
25 A. I'm not intimately familiar with the statistics

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1 about that.

2 Q. And people have continued to contract lung
3 cancer and chronic obstructive pulmonary disease
4 during that period of time; haven't they?
5 A. That is true.
6 Q. And have continued to contract other diseases as
7 a result of smoking; correct?
8 A. Well certainly the association is there.
9 Q. And that human experiment has continued all the
10 while during which the industry has said that smoking
11 does not cause disease; correct?
12 A. Well human experiment is a characterization they
13 are giving it, probably to make it look dramatic.
14 Certainly people smoke, and I don't -- it's not our
15 position that smoking does not cause disease.
16 Q. People, sir, since 1974 have continued to smoke
17 and the industry, the industry during that time has
18 said -- has not said, excuse me, that smoking does
19 not cause disease; has it?
20 A. I -- I can't speak for the industry. I can tell
21 you what our position is. We do not say --
22 We do not deny that smoking causes disease.
23 Q. You don't say that smoking causes disease; do
24 you?
25 A. We say that smoking may cause disease. I

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1 assume, based on the epidemiology, that it does.
2 Q. You assume it does?
3 A. I assume it does based on the epidemiology, yes.
4 Q. Should scientists then make the statements on
5 behalf of the companies looking at the Frank
6 Statement, or should the lawyers? Who should speak
7 on matters of health, --
8 A. Well --
9 Q. -- the scientists or the lawyers?
10 A. You're holding up the statement here. The
11 statement that was made, expression of belief 45
12 years ago, and trying to compare it to today's
13 standards. The science was very different then than
14 it is today.
15 Q. Sir --
16 A. I believe -- I believe that views about smoking
17 and health are best developed, the scientific
18 position is obviously best developed by scientists.
19 Q. Well the issue of smoking and health is a
20 scientific issue; is it not?
21 A. Well it -- it spans many areas. It's
22 scientific, there's legal issues, there's public
23 health issues, there's economic issues, there's
24 political issues. There are many issues surrounding
25 smoking and health, I think, as -- as everyone knows.

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1 Q. What's the legal issue? You may be held
2 responsible for the fact that you admit that your
3 product kills people?
4 MR. BERNICK: Your Honor, --
5 Q. Is that the issue?
6 MR. BERNICK: -- A, it's argumentative, B,

7 I think it's improper to be asking a witness for
8 legal views and an expression of legal opinions.
9 THE COURT: Well he stated that there's a
10 legal issue. I think he can ask what that legal
11 issue is.

12 Q. Sir, what's the legal issue, that your company
13 and the industry will be held responsible for its
14 conduct with regard to the smoking-and-health issue?
15 Is that the legal issue?

16 A. The legal issue is even though in our -- in our
17 society, which is a free society, and people say we
18 can engage in activities that may be risky, and
19 society has collectively said people can have access
20 to tobacco products if they wish, because we're a
21 free-market society, that means companies engage in
22 the manufacture and sale of those products. That's
23 the way our economy works. But because the product
24 has a problem, we can get sued for that. There's a
25 legal issue. And that has happened, we've been sued

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1 repeatedly from almost the beginning of -- of the
2 concern on smoking and health because our product has
3 risks.

4 Q. Because your product kills?

5 A. That's the legal issue.

6 Q. That's the legal issue.

7 A. It may.

8 Q. It may?

9 A. It may, yes.

10 Q. Do you believe your product kills people?

11 A. I assume that that's -- that's definitely a
12 possibility, based on the epidemiology.

13 Q. I didn't ask you if it's definitely a
14 possibility. Do you believe your product kills
15 people?

16 A. I think it may.

17 Q. You think it does; don't you?

18 A. I assume that it does based on the epidemiology.

19 Q. You know it does.

20 A. I don't -- I don't know that it does.

21 MR. BERNICK: Your Honor -- Your Honor --
22 excuse me. It's badgering the witness at this point.

23 THE COURT: Why don't you move on, counsel.
24 BY MR. CIRESI:

25 Q. Now sir, should the scientists speak for the
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1 companies on this issue?

2 MR. BERNICK: Your Honor, that's been asked
3 and answered twice now.

4 THE COURT: Well, I think you better
5 rephrase that. What issue are you talking about?

6 Q. On the issue of smoking and health, should the
7 scientists be the people who speak to the consumer?

8 A. I'm not sure if the scientists are the people
9 that should speak to the consumers. I think that
10 if the scientific position is asked, the scientists
11 are the most appropriate people to make that

12 position. But I do think the consumer should be made
13 aware of the health risks, but I don't believe that
14 scientists in tobacco companies are the appropriate
15 people to do that, I think the public health
16 authorities are the appropriate people to do that.

17 Q. Well let me ask you to assume that the company
18 has a responsibility to speak to the consumers. If
19 that is true, would you not agree that it is the
20 scientists who should speak to the company and not
21 the lawyers on matters of health?

22 MR. BERNICK: Third time it's been asked
23 now, Your Honor.

24 THE COURT: That's a little different
25 question.

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1 A. I'm -- I'm sorry. You're asking me to make what
2 assumption?

3 Q. I want you to assume that the company has a
4 responsibility to speak to consumers. If that is
5 true, would you not agree that it is the scientists
6 who should speak to the company and not the lawyers
7 on matters of public health?

8 A. Speak to the company or the consumers?

9 Q. To the consumers.

10 A. To me it's a complicated area, because when
11 you're talking about communicating to consumers,
12 you're talking about public communications and -- and
13 also you're potentially talking about warnings. It
14 may be that warnings are best left to people who are
15 experts in making warnings. The scientists may not
16 express things in the best way to do it. They may
17 say, well, on the one hand here, but on the other
18 hand there, whereas someone who's an expert in
19 providing warnings may know how to craft these things
20 in very precise language or very simple language to
21 make it very clear. I don't -- I mean I can't give
22 you --

23 I'm not trying to be evasive. I just don't know
24 that scientists are the best because sometimes
25 scientists use very technical language or try to be

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1 very precise, and it may not be the best way to
2 communicate. So I can't really give you an opinion
3 about that that's informed.

4 Q. Well let me see if I can help you. Let's assume
5 that I'm the CEO of Brown & Williamson and I want to
6 know if smoking causes cancer. Should I ask the
7 lawyer that question, or should I ask the scientist?
8 Who's qualified?

9 A. If you want to know the legal issues, you should
10 talk to the lawyer. If you want to know --

11 Q. No, I want to know --

12 A. If you want to know what the science is, you
13 should certainly talk to a scientist.

14 Q. All right. So I should ask the scientist does
15 smoking cause disease; correct?

16 A. Yes.

17 Q. And if the scientist tells me it does cause, and
18 if I have a duty -- and I want you to assume that --
19 to tell the consumers that, should I follow the
20 scientist's advice or should I ask the lawyers
21 whether I should?

22 MR. BERNICK: Your Honor, I object. This
23 calls for a legal conclusion. He's now giving him a
24 legal hypothetical. He's asking him the
25 responsibilities of the management.

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1 THE COURT: No. You may answer that
2 question.

3 A. I think the assumption that -- that we in fact
4 do have a duty to do that, and I don't know if that's
5 true, I would say that the advice should come from
6 the scientist.

7 Q. The lawyers should not shape it, slant it, or
8 temper it; should they, sir?

9 A. I don't know what you mean by shape, slant or
10 temper. Those are value-laden terms; they can mean
11 many different things to many people. And if I say
12 "yes" or "no," I'm not sure what I've just agreed to
13 because I'm not sure what you mean or how it will be
14 taken by the people in the courtroom.

15 Q. So you just don't understand those words.

16 A. I prefer not to say anything unless I know
17 exactly what you mean, because I don't know what I'm
18 responding to because I don't know what you're saying
19 or how it's being taken.

20 Q. Now you said this is a free country; correct?

21 A. Relatively, yes.

22 Q. And when it's a free country, people are able to
23 exercise their free, unfettered will; correct?

24 A. Within limits.

25 Q. And when they're exercising their free,

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1 unfettered will, they shouldn't be impaired in terms
2 of exercising that will; correct?

3 A. Within the limits that society has agreed to.
4 There -- I mean obviously there's constraints.

5 Q. And if someone is addicted, their free will is
6 impaired; isn't it?

7 A. Depends on what you mean by addiction.

8 Q. Do you understand addiction at all?

9 A. I understand there's many ways that people can
10 define addiction. It can -- can be very narrowly
11 defined, such as from a pharmacological definition,
12 it can be broadly defined and include things like
13 gambling.

14 Q. Well does gambling kill 400,000 people a year?

15 A. I read an article in the St. Paul paper last
16 week that suggested --

17 Q. Sir, --

18 A. -- it kills many people --

19 Q. -- I'm not asking you --

20 A. -- because of increased suicide rates.

21 Q. I'm not asking you about the paper.

22 A. Well I'm trying to answer.
23 Q. Does gambling kill 400,000 people a year?
24 A. My understanding is it takes a huge toll on
25 society, up to 50 billion dollars a year and they've
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1 been responsible for increased suicide rates,
2 particularly among teen-agers. That's what the St.
3 Paul paper reported last week.
4 MR. CIRESI: Your Honor, I'm going to move
5 to strike.
6 THE COURT: That answer will be stricken as
7 non-responsive.
8 BY MR. CIRESI:
9 Q. Does gambling, in accordance with any reported
10 epidemiological studies or medical studies, kill
11 400,000 people a year?
12 A. I have read accounts of science that suggests
13 it's responsible for increased suicide rates.
14 Q. Sir, that's not what I asked you. Can you
15 answer my question?
16 A. But the number wasn't 400,000 a year.
17 Q. Now if someone is addicted, and I want you to
18 assume they're addicted to cigarette smoking, is
19 their free will impaired?
20 A. It's hard to say. I think people --
21 Q. If you don't know, just tell me you don't know.
22 A. Well I -- I don't know if free will is impaired
23 or not. I used to smoke. I don't know if I was
24 addicted or not, but I quit. And I know many people
25 do quit. So it seems to me if people want to, they
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12303

1 can quit.
2 Q. Do you know how many people have tried to quit
3 and relapse?
4 A. No.
5 Q. Do you know how many people have tried to quit
6 before the age of 65 and have been totally and
7 utterly unsuccessful?
8 A. I think that people's ability to quit spans a
9 wide range. I think some people can do it with
10 relative ease, I think some people have great
11 difficulty. Many people have quit, many people have
12 tried and haven't quit.
13 Q. Do you know that --
14 A. I think it spans a range of -- of responses.
15 Q. You know that the overwhelming majority, based
16 on studies, of people who tried to quit smoking
17 cannot quit.
18 MR. BERNICK: Objection, this is counsel
19 testifying. If there's a particular study that he
20 has in mind, he ought to show it to the witness.
21 THE COURT: Do you have a study, counsel?
22 MR. CIRESI: I'm only asking if he knows,
23 Your Honor.
24 THE COURT: Well then you'll have to
25 rephrase the question.

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1 BY MR. CIRESI:
2 Q. Do you know if there are studies regarding the
3 number of people who have tried to quit and are
4 utterly unsuccessful?
5 A. Certainly. Many studies like that have been
6 conducted.
7 Q. And are you aware that the Surgeon General has
8 addressed that issue?
9 A. Well the Surgeon General's Advisory Committee
10 has looked at the issue twice, and they came to
11 different conclusions on both occasions.
12 Q. Sir, are you aware that they've addressed the
13 issue of how many people have tried to quit and were
14 unsuccessful?
15 A. Yes, I've seen that -- that information reported
16 in the Surgeon General's reports.
17 Q. And you have --
18 Based on that, you are aware that the vast
19 majority are unable to quit; aren't you?
20 A. I don't know if I can say it's the majority. I
21 just know a lot of people have quit and a lot of
22 people have not. Whether or not it's more than 50
23 percent, I don't recall the exact numbers.
24 Q. Do you know, based on any readings of the FTC
25 materials, the success ratio of people trying to quit

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1 even when they have surgery for cancer?
2 MR. BERNICK: Your Honor, again this is now
3 like the fourth or fifth question that's been asked
4 without reference to any piece of data or any study.
5 It is counsel testifying.
6 THE COURT: Well you can ask the question.
7 I think --
8 MR. CIRESI: That's all I'm asking.
9 A. No, I'm not immediately familiar with F --
10 specifically FTC data or research in the area. I'm
11 relying mostly on Surgeon General's reports,
12 individual publications, and my own personal
13 experience.
14 Q. Do you know if the FTC has reported how many
15 people can quit even after surgery for heart disease?
16 A. No.
17 Q. You haven't seen any --
18 A. I don't know what they -- I'm not saying that --
19 I don't know --
20 If they report it, I don't know what the numbers
21 are.
22 Q. You know that they've reported on that, though;
23 don't you?
24 A. Actually I don't. I don't recall seeing FTC
25 data on this. I've seen a lot of data in Surgeon

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1 General's reports and research into human smoking
2 behavior, but not specifically FTC.

3 Q. Have you seen reports of the FTC in 1994? Does
4 that refresh your recollection?
5 A. Not on addiction.
6 Q. Okay. Did you see a report in the FT -- from
7 the FTC in 1994 regarding a conference held on
8 December 4th through 6th, I believe it was, 1994
9 concerning the FTC measuring standard?
10 A. Yes.
11 Q. Did you read that?
12 A. Yes.
13 Q. And was there a report in there at page 113
14 concerning the ability of people to quit smoking even
15 after lung surgery or heart surgery?
16 A. I don't recall specifically that item on page
17 113.
18 Q. When's the last time you read it, sir?
19 A. That particular report?
20 Q. Yes.
21 A. I think I referred to it certainly within the
22 last two or three months. But it wasn't that
23 particular thing that I was referring to.
24 Q. You were looking for something else at that
25 point?

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1 A. I -- I believe -- well the FT --
2 That report is very informative. It has a lot
3 of different things about a lot -- lot of different
4 chapters that give a lot of different issues. I
5 think I was looking basically to see what -- what --
6 what the history of deliveries have been, deliveries
7 of tar and nicotine.
8 Q. So you only looked at one portion of the report;
9 is that what you're saying?
10 A. Well when I referred to it last three months
11 ago, I read the whole report. You asked me when I
12 last referred to it, and that's what I referred to it
13 for. I go back to it frequently for bits and pieces
14 of different things.
15 MR. CIRESI: Your Honor, do we have the
16 court-admitted exhibit on that? I believe it's 4394,
17 FTC monograph.
18 THE COURT: We'll get it for you. Just a
19 minute.
20 MR. CIRESI: We can go on, Your Honor.
21 4675, I'm sorry. 4675.
22 THE WITNESS: In binder --
23 MR. CIRESI: No, it's not there, doctor.
24 We're going to try to get it for you. I'm sorry.
25 THE WITNESS: Oh, okay.

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1 BY MR. CIRESI:
2 Q. Now when the Frank Statement was published, did
3 you review the documents which led to that
4 publication?
5 A. No. Well actually I take it back, I think I did
6 see one document, seemed like it was related to it.
7 Q. Can you direct your attention to Exhibit 18904.

8 A. That in binder two?
9 Q. That is in binder one, sir.
10 A. Binder one. 18 what?
11 Q. 904.
12 Have you seen that document before, sir?
13 A. Let me look. Let me refer to it.
14 Yes, I think I have.
15 Q. And this was a document which led to the
16 formation of the TIRC and the issuance of the Frank
17 Statement; correct?
18 A. It seems to certainly be related. I don't know
19 if it led to it, but a lot of the -- lot of the
20 things that are discussed in the Frank Statement
21 appear in this document, from my recollection.
22 Q. And you recall that the research directors of
23 the companies met with Hill & Knowlton personnel?
24 A. I don't remember that. It may say that in here.
25 I don't recall that.

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1 Q. If you go to page two, you'll see that, sir.
2 See at the top, "The attitude of the men we must
3 directly deal with in the industry is at once
4 interesting, and important for us to understand.
5 That is why notes on the four interviews with
6 'research directors' are given at some length.
7 You'll get from them little real information about
8 lung cancer, pro or con; but you'll find some mighty
9 interesting opinions. One of the men said, 'It's
10 fortunate for us that cigarettes are a habit they
11 can't break." Do you see that?
12 A. Yes.
13 Q. "Said another: 'Boy! wouldn't it be wonderful
14 in our company was the first to produce a cancer free
15 cigarette. What we could do to the competition!'"
16 Do you see that?
17 A. Yes.
18 Q. And if you go on to page five -- actually page
19 three first. I'm sorry, doctor. If you go back two
20 pages. Do you see that there was one problem being
21 referenced in 1953, and that was "confidence, and how
22 to establish it; public assurance, and how to create
23 it -- in a perhaps long interim when scientific
24 doubts must remain." Do you see that?
25 A. Yes.

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12310

1 Q. And if you go on to page five, then, the issue
2 phrased was "How to validate this message of
3 assurance. The men talked to in the cigarette
4 companies tend to," and then there's (a), (b), (c)
5 subparagraphs, do you see that?
6 A. Yes.
7 Q. They tend to "Think occasionally in terms of
8 trying to 'smear' the personal responsibility,
9 motives, judgments, or techniques of Wynder and
10 others supporting him." Do you see that?
11 A. Yes.
12 Q. And then down at (c), they tend to "Overlook the

13 fact that in this particular instance, the stakes for
14 the public are even larger than for the tobacco
15 manufacturers. (For the public, an issue touching
16 the deepest of human fears and instincts is
17 involved - the issues of uncontrollable disease and
18 death. Hence cigarette companies might not readily
19 be forgiven, if their approach to this problem is
20 stemmed only from their eagerness to protect their
21 earnings, and if they twisted the research of medical
22 science (which seeks to save men) into a device to
23 save stockholders. There is no precedent where a
24 great industry has been forced to face such grave
25 issues.

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12311

1 "In the past, industry has given little twists
2 to the facts of science, to convert them into sales
3 propoganda, without much risk. The cigarette
4 industry has indeed been doing this for years. We
5 can therefore readily understand its assumptions that
6 the same technique will work now, in devising
7 propoganda. But it is highly important to note that
8 the deep issues of life-and-death that are now
9 involved make highly doubtful the question as to
10 whether the familiar techniques can be relied on.
11 The stakes are too large; the penalties for losing
12 could be too great.)"

13 Now you'll recall when we looked at Exhibit
14 11028, which was the trip report of Dr. Felton and
15 others, that they were talking about the purpose of
16 the TIRC and how it was nothing but propoganda. Do
17 you remember that?

18 A. I don't remember them saying it was nothing but
19 propoganda.

20 Q. Well do you remember words to that effect, sir?

21 A. It may have been, but I --

22 Q. They talked about the oft-repeated statement
23 "not proven," do you remember that?

24 A. I don't know if they said -- if they talked
25 about propoganda in context of that particular type

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12312

1 of wording or if they tried to characterize -- I
2 don't -- I don't remember them characterizing the
3 entire TRC program as propoganda or if the propoganda
4 word was linked to that particular statement. That I
5 don't recall.

6 Q. Well I'll just read it to you. "Liggett & Myers
7 stayed out of TIRC originally because they doubted
8 the sincerety of TIRC motives and believed the
9 organization was too unwieldy to work efficiently.
10 They remain convinced that their misgivings were
11 justified. In their opinion, TIRC has done little,
12 if anything, constructive. The constantly reiterated
13 'not proven' statements in the face of mounting
14 contrary evidence has thoroughly discredited the
15 TIRC." Do you remember that?

16 A. Yes. So it appears the propoganda wording was
17 referring to the "not proven" phrase they talked

18 about and not about the entire TIRC program.
19 Q. Thoroughly discredited; correct, sir?
20 A. That's the wording they used.
21 Q. And the purpose of the TIRC was for a public
22 relations campaign which was positive in nature and
23 entirely pro cigarette; correct?
24 A. I think the TIRC probably, like many
25 organizations, fulfilled many functions, if --
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12313

1 From a scientific point of view they certainly
2 funded and resulted in the publication of a vast
3 amount of science on smoking and health, but
4 nevertheless I can understand why a public relations
5 person might view it as a public relations forum, and
6 public relations activities may have come from that
7 forum, but that does not mean that meritorious
8 science was not conducted at TIRC.
9 Q. Do you know who ran the TIRC when it was formed?
10 A. No.
11 Q. Do you know if Hill & Knowlton ran it?
12 A. No, I don't.
13 Q. Can you go to Exhibit 19 -- 18905, the next
14 exhibit in your book.
15 A. Yes, it's right here next to the other one.
16 Q. You read that, too; didn't you, sir?
17 A. Well let me look at it. It isn't immediately
18 familiar.
19 Q. Dated December 15th, 1953.
20 A. Yes, I see that.
21 Q. This was a meeting at the Hotel Plaza, New York
22 City.
23 A. Yeah, but --
24 I think this is familiar now.
25 Q. And if you look at the fourth paragraph and the
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12314

1 participants, --
2 A. Yes.
3 Q. -- you see that Brown & Williamson is mentioned?
4 A. Yes.
5 Q. And you see that the chief executive officers of
6 all the leading companies have agreed to go along
7 with the public relations program on the health
8 issue?
9 A. No, I don't see that.
10 Q. Well --
11 A. Which paragraph?
12 Q. -- let me read it -- let me read it to you. The
13 same paragraph. "The group was called together by
14 Mr. Paul Hahn, President of The American Tobacco
15 Company. The chief executive officers of all the
16 leading companies - R. J. Reynolds, Philip Morris,
17 Benson & Hedges, U.S. Tobacco Company, Brown &
18 Williamson - have agreed to go along with the public
19 relations program on the health issue." Correct?
20 A. That's what the document says, yes.
21 Q. And if you go on to the next page, it's "The
22 Industry's Position." Do you see that?

23 A. Yes, I see that.
24 Q. And if you go to the fourth paragraph, you see
25 that?

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12315

1 A. Fourth paragraph?
2 Q. Under Roman numeral III.
3 A. Yes. "They feel...?" Yes.
4 Q. "They feel they should sponsor a public
5 relations campaign which is entirely -- which is
6 positive in nature and is entirely 'pro-cigarettes;'
7 correct?
8 A. That's what it says, yes.
9 Q. Now it was about three weeks after the formation
10 or the -- this meeting that the TIRC was formed and
11 the Frank Statement was issued; correct, sir?
12 A. I'll accept that representation. I haven't
13 connected up all the dates myself, but --
14 Q. Well this is December 15th, 1953, and the Frank
15 Statement, Exhibit 14145, was published in 449
16 newspapers on January 4th, 1954; correct?
17 A. Okay.
18 Q. Is that right, sir?
19 A. I assume it is. I can't see it from here.
20 Q. And the purpose of the strategy of the industry
21 over the ensuing 40 years was to create doubt in the
22 public's mind; isn't that correct?
23 A. I don't think that's my --
24 I wouldn't characterize it that way.
25 Q. Can you go to Exhibit 20987, which is in the

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12316

1 beginning of your second volume.
2 A. What was that number again?
3 Q. 20987.
4 A. Yes, I've got it.
5 Q. And this is a memorandum from Horace Kornegay.
6 Remember his name? He was at that meeting of the
7 Committee of Counsel.
8 A. I remember the name, but I forgot where.
9 Q. Well he was at the Committee of Counsel meeting
10 where they were discussing how they were going to
11 deal with the additives issue. Do you recall that?
12 A. Yes.
13 Q. And this is to Mr. Kornegay from Fred Panzer.
14 I'll represent to you that Mr. Kornegay was the
15 president of The Tobacco Institute, and Fred Panzer
16 was the vice-president of The Tobacco Institute.
17 Will you accept those representations?
18 A. Yes.
19 Q. And do you see that in the second paragraph Mr.
20 Panzer, in writing to Mr. Kornegay, says, "For nearly
21 twenty years the industry has employed a single
22 strategy to defend itself on three major fronts --
23 litigation, politics and public opinion?"
24 A. Yes, I see that.
25 Q. And do you see that it says, "While the strategy

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1 was brilliantly conceived and executed over the years
2 helping us to win important battles, it is only fair
3 to say that it is not - nor was it intended to be - a
4 vehicle for victory. On the contrary, it has always
5 been a holding strategy, consisting of
6 "creating doubt about the health charge without
7 actually denying it." Do you see that?
8 A. Yes.
9 Q. And as somebody embarks upon a holding strategy
10 to create doubt, it would be helpful to such a
11 strategy to withhold and suppress information;
12 wouldn't it, sir?
13 A. I suppose it depends upon how the strategy is
14 executed.
15 Q. Well if it's brilliantly conceived and executed,
16 you would agree that suppressing information would be
17 very important in carrying out that strategy;
18 wouldn't you?
19 A. Well "brilliantly conceived" doesn't tell me
20 anything about the how the strategy was -- how the
21 strategy may have been implemented. That's -- that's
22 a rating.
23 Q. You didn't conceive of the strategy; did you,
24 sir?
25 A. Did I?

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1 Q. Yes.
2 A. No.
3 Q. You were not at the highest levels of the
4 companies determining what their strategy would be on
5 these issues; were you?
6 A. No.
7 Q. You've never been at the highest levels of the
8 companies deciding what the strategy would be and how
9 it would be executed; have you?
10 A. No.
11 Q. And sir, there are internal documents of B.A.T
12 itself which show that causation has been proved;
13 aren't there?
14 A. Could you refer me to the document?
15 Q. Can you look at Exhibit 26212.
16 By the way, had you ever seen Exhibit 20987
17 before?
18 A. Which is --
19 Is that the one we're looking at now?
20 Q. The Kornegay one.
21 A. Looks familiar.
22 Q. When did you first see it?
23 A. I don't recall.
24 Q. Was it within the past few days?
25 A. It probably was, because, you know, these

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1 documents, which I said, you sent them all over, but
2 I don't know if that's the first time I saw it or
3 not.

4 Q. Okay.
5 A. I don't recall.
6 Q. Can you direct your attention, then, to Exhibit
7 26212. It is in volume two.
8 A. Yes, I've got it.
9 Q. And that's a chronology of projects by name; --
10 A. Yes.
11 Q. -- correct?
12 And you see the name up there in the upper
13 right-hand corner, that's Ernest Clements; isn't it?
14 A. Yes, it looks like it.
15 Q. And this is a document that is from B&W;
16 correct?
17 A. I assume it is.
18 MR. CIRESI: Your Honor, we'd offer Exhibit
19 26212.
20 MR. BERNICK: Same objections as previously
21 noted and briefed before the court.
22 THE COURT: Court will receive 26212.
23 BY MR. CIRESI:
24 Q. And do you see that this also carries the legend
25 privileged and confidential, produced as required by
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12320
1 the court's March 7th, 1998 order?
2 A. Yes.
3 Q. And do you see the name in the upper right-hand
4 corner, Ernest Clements?
5 A. Yes.
6 Q. Do you know who that is?
7 A. I believe he's a paralegal with a law firm that
8 helps us manage our records.
9 Q. What law firm is he with?
10 A. Wyatt -- I forgot the exact name, Wyatt Tarrant
11 & Combs.
12 Q. Wyatt & Combs.
13 A. Tarrant, something like that.
14 Q. And Tarrant; correct?
15 A. Something like that.
16 Q. The Louisville firm; correct?
17 A. Yes.
18 Q. The one that Mr. Pritchard was talking about
19 sending documents to without a cover letter; correct?
20 A. I believe that was the firm that was mentioned
21 in that memo -- or that document.
22 Q. Can you go to Bates number 319, the last three
23 numbers.
24 While you're looking, when's the first time you
25 got this document, sir?
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12321
1 A. Actually this is the first time I've seen this
2 document.
3 Q. Very first time right now.
4 A. Right now.
5 Q. Okay. Page 319, do you see about halfway down
6 there's a notation RD-1494?
7 A. Yes.
8 Q. Do you see that it says "MASSEY, S.R.?"

9 A. Yes.
10 Q. "ANALYSIS OF NITROS-NOR-NICOTINE IN TOBACCO AND
11 OTHER SMOKING MATERIALS?"
12 A. YES.
13 Q. "CONTAINS CONCESSION ON CONFIRMATION -- AND
14 CONFIRMATION OF CAUSATION BY BAT?" Do you see that?
15 A. Yes.
16 Q. First time you've seen that?
17 A. Yes, it is.
18 Q. Can you go on to the next page. About halfway
19 down, "RD-1091-R. Do you see that? Do you see it,
20 sir?
21 A. Yeah. I can't -- I'm having trouble reading
22 this monitor.
23 Q. Go ahead and use the --
24 A. Which Bates number? Looks like there's two sets
25 of numbers on here.

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12322

1 Q. 224.
2 A. Oh, 224. I think I was on the wrong page. And
3 this is the -- the bottom set of numbers, because
4 there's another set of numbers, US --
5 Q. Not the UCS.
6 A. Okay. 224?
7 Q. Correct.
8 A. All right.
9 Q. RD-1091 --
10 A. Yes.
11 Q. -- dash R. Nineteen -- or excuse me, it says
12 740804. Do you see that?
13 A. Yes.
14 Q. Okay. "NEWELL, D.G.?" Do you see that?
15 A. Yes.
16 Q. "QUALITATIVE EFFECT OF CELL TRANSFORMATION BY
17 CIGARETTE SMOKE CONDENSATE IS ESTABLISHED. CONTAINS
18 CONCESSION AND CONFIRMATION OF CAUSATION." Do you
19 see that?
20 A. Yes, I see that.
21 Q. First time you've seen it?
22 A. Yes.
23 Q. Can you go on to page three -- or excuse me,
24 233, the last three Bates numbers.
25 A. So back one page? No. Oh, I'm sorry.

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12323

1 Q. 233. Do you have it, sir?
2 A. Yes.
3 Q. Go to the very last entry.
4 A. Yes.
5 Q. Do you see it?
6 A. Yes.
7 Q. "REVIEWS THE BIOLOGICAL ACTIVITY OF SMOKE
8 CONDENSATE FROM ST. PAUL CIGARETTE. DOCUMENT
9 CONTAINS CONFIRMATION OF CAUSATION." Do you see
10 that?
11 A. I don't know if it says St. Paul or St. Pauli,
12 but I can't read this. I'm not sure if it says St.
13 Paul.

14 Q. Well you certainly can read "DOCUMENT CONTAINS
15 CONFIRMATION OF CAUSATION," can't you?
16 A. That part I can read.
17 Q. Is that the first time you've seen that?
18 A. Yes.
19 Q. Can you go on to the next page. Or excuse me,
20 page 244, I'm sorry, doctor.
21 A. 244?
22 Q. Correct.
23 A. Yes.
24 Q. And do you see about five down there's a
25 reference to Auerbach and Kennedy?

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12324

1 A. Yes.
2 Q. "AUERBACH HAS APPARENTLY PRODUCED LUNG CANCER
3 AND EMPHYSEMA IN DOGS BY INTRODUCING SMOKE BY DIRECT
4 INHALATION. COMMENTS BY KENNEDY" --
5 A. Yes.
6 Q. -- "'NO QUESTION THAT AUERBACH HAS INDEED
7 PRODUCED AN EFFECT IDENTICAL TO EMPHYSEMA IN HIS
8 STUDIES.'" Do you see that?
9 A. Yes.
10 Q. And emphysema is chronic obstructive pulmonary
11 disease; isn't it, sir?
12 A. It's -- well chronic obstructive pulmonary
13 disease is a broad term used for a collection of
14 different diseases.
15 Q. One of which --
16 A. One of which is emphysema.
17 Q. It results in an excruciating death; does it
18 not?
19 A. My understanding is -- is that it can be a
20 difficult death. I don't know if excruciating.
21 Q. People gasping for breath; correct, sir?
22 A. I think in the severe stages, that can happen.
23 Q. And can you direct your attention now to Exhibit
24 26185, which is back just a little bit from where you
25 were.

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12325

1 A. Back one, or --
2 Q. Back a few. 26185.
3 A. Yes.
4 Q. This is a 1982 document?
5 A. Yes.
6 Q. CAC VII?
7 A. Yes.
8 Q. "WHAT ARE THE OBSTACLES/ENEMIES OF A SWING TO
9 LOW 'TAR' AND WHAT ACTION SHOULD WE TAKE?"
10 A. That's what the title is, yes.
11 Q. And can you go to the last page. Do you see the
12 initials JKW?
13 A. Yes.
14 Q. That's J. Kendrick Wells; correct?
15 A. I assume so.
16 MR. CIRESI: Your Honor, we'd offer Exhibit
17 26185.
18 MR. BERNICK: Same objections as stated

19 previously, Your Honor.

20 THE COURT: Court will receive 26185.

21 BY MR. CIRESI:

22 Q. This is a speech given by Mr. Wells to CAC VII.
23 I'd like to go through it with you, sir.

24 A. Okay.

25 Q. "Statements on cigarette smoking by public
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12326

1 health opinion leaders in the U.S., such as the
2 Surgeon General, the American Cancer Society and
3 commentators now consist predominantly of dramatic
4 warnings and stern advice to quit."

5 Now you see that this is dated July 2nd, 1982;
6 correct?

7 A. Yes.

8 Q. After the 1981 Surgeon General's report;
9 correct?

10 A. Yes.

11 Q. And the legend over on the left is, again,
12 privileged and confidential, produced as required by
13 the court's March 7, 1998 order; correct?

14 A. Yes.

15 Q. We go back to the text. "The public health
16 establishment is concerned that statements
17 attributing less risk to lower delivery cigarettes
18 have supported consumption. Consequently, the
19 American Cancer Society has adopted the Surgeon
20 General's position that there is no safe cigarette;
21 smoking cigarettes with lower yields reduces only the
22 risk of lung cancer, provided there is no
23 compensatory increase in the amount smoked;" --

24 Do you see that?

25 A. Yes.

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12327

1 Q. -- "and 'the single most effective way to reduce
2 the hazards of smoking continues to be that of
3 quitting entirely.'" Correct?

4 A. Yes. I think he's quoting directly from the
5 Surgeon General's report here.

6 Q. And at the CAC VII conference, Mr. Wells went on
7 to state that a serious attack was forming against
8 lower delivery cigarettes; correct? Paragraph that
9 starts at the bottom of the page.

10 A. Yes, I'm -- I'm just trying to read it.

11 Q. And that attack is "predominantly on the ground
12 that smokers adjust their smoking behavior;" correct?

13 A. That's what it says.

14 Q. And if you go on to the next page, do you find
15 that in the second paragraph, "The attack also has
16 used the additives issues. The American Cancer
17 Society, for example, has charged that additives
18 unknown to the public may make lower delivery
19 cigarettes as dangerous as higher delivery products."
20 Correct?

21 A. That's what it says, yes.

22 Q. And then Mr. Wells sets forth what B&W and the
23 CAC group is going to do to counter what the public

24 health authorities are saying; correct?
25 Let me help you out. Third paragraph. "B&W
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12328

1 will undertake activities designed to generate
2 statements by public health opinion leaders which
3 will indicate tolerance for smoking and improve the
4 consumers' perception of ultra low tar cigarettes (5
5 milligrams or less). The first step will be
6 identification of attractive scientists not
7 previously involved in the low delivery controversy
8 who would produce studies re-emphasizing the lower
9 delivery, less risk concept. Through political and
10 scientific friends, B&W will attempt to elicit from
11 the administration and legislative branches of the
12 federal government, and perhaps voluntary health
13 groups, statements sympathetic to the concept that
14 generally less health risk is associated with ultra
15 low delivery cigarette consumption. The program is
16 designed to produce statements of sufficient news
17 interest to reach the public through the media."

18 Do you see that?

19 A. Yes.

20 Q. So what Mr. Wells is describing here is a
21 campaign on behalf of B&W and the CAC companies to
22 influence political and scientific friends in order
23 to generate statements that will reach the public
24 through the media; correct?

25 A. That's what it says, yes.

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12329

1 Q. "In addition, B&W would seek to generate
2 spontaneous mainstream media articles dealing with
3 component deliveries, much as the old Readers Digest
4 articles."

5 Now sir, did you read Professor Berman's
6 testimony?

7 A. Who?

8 Q. Professor Berman in this case.

9 A. No, I didn't.

10 Q. He was a witness on behalf of the industry. You
11 didn't read it?

12 A. No.

13 Q. Do you know anything about Dr. Diehl's book and
14 about the planting of articles by the industry?

15 A. No.

16 Q. "The publication this year of the Lee and
17 Garfinkel paper, which found reduced mortality for
18 lung cancer, other respiratory diseases and CHD
19 associated with lower delivery, was ignored by the
20 U.S. media. This may signal that a comprehensive
21 opinion leader program will be necessary to achieve
22 public consciousness."

23 "A fundamental theme of the program will be
24 that government and private health groups have a duty
25 to the millions of smokers to present effectively the

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1 concept of risk reduction inherent in the
 2 dose-response foundation of the case against smoking.
 3 B&W would not endorse the position that smoking or
 4 delivery levels are related causally with disease.
 5 Carefully structured research grants to individual
 6 scientists and perhaps private health organizations
 7 will be essential to the success of the program."

8 Now this is the same individual, Mr. Wells,
 9 who's talking about carefully structured research
 10 grants who talked about slanting information; didn't
 11 he?

12 A. I remember a reference to slanting. I don't
 13 remember if that was a -- a Kendrick Wells document
 14 or not.

15 Q. "Changing the context of scientific
 16 information," do you remember that phrase?

17 A. No, I don't remember that.

18 Q. If you go on, then, to the next page, sir, last
 19 paragraph, "B&W will urge the industry to sponsor
 20 research in the ultra low delivery cigarette area
 21 which turns the principles used against the industry
 22 to positive use. Research projects would include new
 23 evaluations of epidemiological data base with
 24 conclusions which parallel those of Hammond, Gori and
 25 others pertaining to risk reduction associated with

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1 ultra low delivery cigarettes. The new studies
 2 should include CVD," --

3 Do you know what that means?

4 A. I assume it means coronary vascular disease.

5 Q. Cardiovascular disease. Is that what it's
 6 referring to?

7 A. I've seen it both ways.

8 Q. -- "anticipating possible adverse results in the
 9 Multiple Risk Factor Intervention Trial due this
 10 year" --

11 Do you know what that is?

12 A. That particular trial?

13 Q. Tes?

14 A. Yes.

15 Q. And what was it, sir?

16 A. There was a trial that --

17 There was a hypothesis that if people could be
 18 instructed and receive training in altering multiple
 19 risk factors, that they may reduce their incidence of
 20 disease. And the risk factors that were chosen were,
 21 I think, high-fat diet, overweight, cigarette
 22 smoking -- there may have been other dietary factors
 23 like reduced consumption of sodium and also getting
 24 more exercise. The theory was that if people could
 25 influence all those risk factors in the favorable

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1 direction, then perhaps down the road one would see a
 2 reduction in disease incidence.

3 Q. So here they were saying "The new studies should
 4 include CVD, anticipating possible adverse results in

5 the Multiple Risk Factor Intervention Trial;"
6 correct?
7 A. That's what it says, yes.
8 Q. And if you go on to the next page, "Industry
9 positions favoring the low delivery cigarette can be
10 effectively presented," --
11 Do you see that --
12 A. Yes.
13 Q. -- down at the end?
14 -- "but must be carefully structured. An
15 industry and government dialogue will pace -- place a
16 premium on the industry's own research to shape the
17 foundation of the smoking and health controversy.
18 Finally, an effective industry political program
19 involving the Congress and the White House will be
20 essential to success in these programs." Do you see
21 that?
22 A. Yes, I see that.
23 Q. And you recall that when we looked at the JAMA
24 article, Drs. Koop and Kessler were talking about the
25 need to get the industry's information out so that

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1 Congress will have the truth; weren't they?
2 A. I don't recall that. It may --
3 They may have said that, but we've gone over so
4 much that I don't remember every single thing.
5 Q. You don't deny that that was set forth in that
6 article; do you?
7 A. No, no, not at all. I'm just saying I don't
8 remember.
9 Q. And can you go now, sir, to Exhibit 26254.
10 By the way, did Mr. Wells ever give this speech
11 at Brown & Williamson?
12 A. I have no idea, and I don't know if anything
13 he's proposing there ever actually got implemented.
14 This -- it -- it reflects the tension that existed
15 in, on the one hand, the potential benefits of
16 reduced delivery cigarettes which people were talking
17 about, and the fact that it may not --
18 Q. Excuse me, sir. I only asked a very simple
19 question. Did he ever give this speech at Brown &
20 Williamson?
21 A. I don't know.
22 Q. Can you go to Exhibit 26254.
23 A. Got it.
24 Q. Okay. And this is another personal and
25 confidential memorandum, and I'll represent to you

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1 that it's from Shook, Hardy & Bacon, and it's to
2 Philip Morris, and its date is December 1981. See
3 that?
4 A. I don't see it anywhere, but I'll accept your
5 representation.
6 Q. And you see the introduction that "This
7 memorandum is written to provide a critical analysis
8 of legal and scientific problems raised by Dr. L.C.F.
9 Blackman's presentation as found in the Blue Book and

10 in copies of slides used in oral presentations?" See
11 that?
12 A. Yes, I see that.
13 Q. And you know that the Blue Book was a book
14 prepared by BATCo; correct?
15 A. I've -- I've seen --
16 I've heard reference to this book, but I don't
17 actually know what it is. I haven't seen it and
18 don't know exactly what the Blue Book is or was.
19 Q. Have you learned enough to know that it dealt
20 with smoking-and-health issues?
21 A. Well I've always seen it referred to in the
22 smoking-and-health context, but I don't know just
23 what it dealt with actually.
24 MR. CIRESI: Your Honor, we would offer
25 Exhibit 26254.

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1 MR. BERNICK: Same objections as previously
2 lodged before the court.
3 THE COURT: Court will receive 26254.
4 BY MR. CIRESI:
5 Q. I'd like to direct your attention, sir, to page
6 16, and that's the actual number of the page, not a
7 Bates number. And you'll see it at the bottom. I
8 want to direct your attention to that portion that
9 talks -- which talks about additional problems and
10 questions regarding the Blue Book. Do you see that?
11 A. Yes.
12 Q. "By stating that the industry has responded to
13 'that strong body of medical opinion' which holds
14 that the lower yield cigarettes are less hazardous,
15 Dr. Blackman is vulnerable to the question of why the
16 industry did not respond to contrary medical opinion,
17 or, equivalently, of how the industry selected the
18 medical opinion which it chose to follow. These
19 troublesome questions remain even if the related
20 issue of adopted -- of adoption by the industry of
21 selected medical opinion can be successfully
22 resolved. Several examples will follow." And then
23 he lists other diseases; correct?
24 A. Yes.
25 Q. Talks about "Because little, if anything, is

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1 known about the effect of lower yield cigarettes on
2 the risks of diseases associated with smoking (other
3 than lung cancer, according to some researchers), it
4 is entirely possible that these disease risks would
5 be increased." See that?
6 A. Yes.
7 Q. Then it talks about initiation of smoking;
8 correct?
9 A. Yes.
10 Q. Compensation; correct?
11 A. Yes.
12 Q. Cell type; correct?
13 A. Yes.
14 Q. And on the next page, additives and flavorings

15 and other ingredients; correct?
16 A. Yes.
17 Q. And in all of these he's pointing out the
18 problems; correct?
19 A. In all these, what he's -- what he's saying is
20 that these are unresolved issues and apparently
21 doesn't feel like it's appropriate to make any health
22 claims about low tar cigarettes.
23 Q. And sir, if you go to the conclusion, "Dr.
24 Blackman's position that the industry's current
25 product modifications" --

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1 Now what were those in 19 -- in the 1980s? They
2 were reduction of --
3 A. I'm not sure what he's referring to, but I
4 assume he means reduction of deliveries.
5 Q. Reduction of tar and nicotine; correct?
6 A. I assume so, yes.
7 Q. The things you talked about in your direct;
8 correct?
9 A. Yes.
10 Q. Okay. "Dr. Blackman's position that the
11 industry's current product modifications are in
12 response to a 'strong body of medical opinion' (which
13 he describes) suffers from major scientific
14 weaknesses. The epidemiological and histological
15 evidence or data on which this opinion relies can be
16 challenged on serious scientific grounds. In
17 addition, important questions are ignored, possible
18 alternative explanations are not discussed, and
19 differing scientific positions are hardly mentioned.
20 This highly selective reading of the scientific
21 literature may be misleading and certainly gives rise
22 to questions to which the industry has no persuasive
23 responses." Do you see that?
24 A. Yes, I do.
25 Q. And do you know that in this courtroom for the

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1 last 62 days, the industry has been suggesting that
2 it was the public health officials who wanted lower
3 tar/lower nicotine cigarettes? Have you been told
4 that?

5 MR. BERNICK: Objection to the misleading
6 form of the question. This is a reference to the
7 scientific literature, not the public health policy.

8 THE COURT: Counsel, counsel, --

9 MR. BERNICK: Object to the form.

10 THE COURT: -- just state your legal
11 objection rather than coaching the witness.

12 MR. BERNICK: I didn't intend to coach the
13 witness. I apologize, Your Honor.

14 THE COURT: Okay. Just state the legal
15 objection so I can rule on the legal objection.

16 MR. BERNICK: Okay. Object to the form of
17 the question, Your Honor.

18 THE COURT: Sustained.

19 MR. CIRESI: I have no further questions.

20 Thank you, doctor.
21 MR. BERNICK: I can get in a few.
22 THE COURT: Why don't we recess, reconvene
23 tomorrow morning at 9:30.
24 THE CLERK: Court stands adjourned, to
25 reconvene tomorrow morning at 9:30.
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1 (Recess taken.)
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